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HISTORICAL STUDY OF THE USE OF

CONFIDENTIAL FUNDS

Compiled by the
Office of General Counsel
January 1953

Office of Finance
1211 Key Building/x2972

CONFIDENTIAL

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CONFIDENTIAL

I

INTRODUCTION

The objective of this study is to correlate such historical and judicial materials relating to the use of confidential funds as are available and to examine them for whatever light they may throw upon the expenditure by this Agency of the confidential funds granted it by Congressional appropriation. Implicit in such a study, of course, is the search for possible guideposts to assist those responsible in determining the purposes for which those appropriations may properly be spent. Common sense dictates certain restrictions upon the disbursements of public funds. The sections that follow and the attached appendices indicate other practical considerations.

Section II of this study is a general review of the background behind the enactment of Public Law 110 of the 81st Congress which extended to this Agency the authority to expend funds for objects of a "confidential, extraordinary or emergency nature." Included in this review are other legislative examples of the power to expend confidential funds, a brief extract of World War II experience, the statutory establishment of CIA, a brief explanation of the contents of Public Law 110, and a summary of the legislative history of the passage of this law.

Section III considers the constitutionality of Congressional attempts to compel disclosure of executive records of a confidential nature.

Section IV develops certain of the judicial doctrines of discovery as applied to diplomatic, state and military secrets.

Section V discusses this Agency's relationship with the General Accounting Office and certain decisions of the Comptroller General which may have a bearing upon the subject of this study.

Section VI records instances of the past use of confidential funds dating back to American Revolutionary times.

Section VII sets forth some general conclusions.

CONFIDENTIAL

II

BACKGROUND OF THE CONFIDENTIAL FUNDS AUTHORITY OF THE CENTRAL INTELLIGENCE AGENCY

A. CIA's Statutory Authority

Section 10 of Public Law 110, 81st Congress, 1st Session, provides as follows:

"SEC. 10. (a) Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions, including--

(1) personal services, including personal services without regard to limitations on types of persons to be employed, and rent at the seat of government and elsewhere; health-service program as authorized by law (5 U.S.C. 150); rental of news-reporting services; purchase or rental and operation of photographic, reproduction, cryptographic, duplication and printing machines, equipment and devices, and radio-receiving and radio-sending equipment and devices, including telegraph and teletype equipment; purchase, maintenance, operation, repair, and hire of passenger motor vehicles, and aircraft, and vessels of all kinds; subject to policies established by the Director, transportation of officers and employees of the Agency in Government-owned automotive equipment between their domiciles and places of employment, where such personnel are engaged in work which makes such transportation necessary, and transportation in such equipment, to and from school, of children of Agency personnel who have quarters for themselves and their families at isolated stations outside the continental United States where adequate public or private transportation is not available; printing and binding; purchase, maintenance, and cleaning of firearms, including purchase, storage, and maintenance of ammunition; subject to policies established by the Director, expenses of travel in connection with, and expenses incident to attendance at meetings of professional, technical, scientific, and other similar organizations when such attendance would be a benefit in the conduct of the work of the Agency; association and library dues; payment of premiums or costs of surety bonds for officers or employees without regard to the provisions of 61 Stat. 646; 6 U.S.C. 14; payment of claims pursuant to 28 U.S.C.; acquisition of necessary land and the clearing of such land; construction of buildings and facilities without regard to 36 Stat. 699; 40 U.S.C. 259, 267; repair, rental, operation, and maintenance of buildings, utilities, facilities, and appurtenances; and

(2) supplies, equipment, and personnel and contractual services otherwise authorized by law and regulations, when approved by the Director.

(b) The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified."

A literal interpretation of Section 10 invests the Director of Central Intelligence with absolute power to control the expenditure of confidential funds allocated to the Agency. Behind this facade of power, however, there lies a history of Congressional, judicial and other inquiries into the area of such expenditures which inescapably leads to the conclusion that constant vigilance is necessary to guard against abuse of the power. If knowledge of such an abuse is obtained outside the Agency, in view of the Congressional propensity to investigate, it will likely precipitate an inquiry possibly followed by statutory revision which might seriously impede, if not effectively halt, certain of the Agency's operations.

B. Other Statutory Authorities

Statutory authority for the employment of confidential funds has a long history in this country. The secret journals of the Continental Congress record numerous appropriations for military expeditions where the provisions for accounting were left to someone's absolute discretion or entirely omitted.

Section 107 of Title 31 of the United States Code, derived from an original Act of February 9, 1793 (C. 4, Section 2, 1 Stat. 300), permits the President to settle annually with the General Accounting Office such appropriations for foreign intercourse or treaties as he considers may be made public; with respect to those which he may think it advisable not to specify, he is authorized to direct the Secretary of State to prepare a certificate of the amount. Such a certificate is to be deemed a sufficient voucher for the sum expended.

Section 107(a) of Title 31 allows the Secretary of State since January 5, 1946, to delegate to subordinates the authority vested in him by Section 107.

Section 108 of the same Title 31, deriving from an Act of August 29, 1916 (39 Stat. 557), established the procedure for the Secretary of the Navy to account, without publicly disclosing, for expenditures

from appropriations for obtaining information from home or abroad. His certificate is to be "deemed a sufficient voucher for the sum therein expressed to have been expended."

C. World War II Experience

From the very beginning of World War II the need for unvouchered expenditures grew enormously. Perhaps the best example of this need for purposes of this study would be the experience of the Office of Strategic Services. Originally its confidential funds were obtained from an appropriation for the Executive Office of the President, but later it received specific appropriations as an independent executive agency. Obviously, only a portion of its operations were sufficiently secret to require exception from the ordinary rules governing audit of Government funds. For this reason, a portion of the total appropriation each year was earmarked for expenditure for objects of a confidential nature, such expenditure to be accounted for solely on the certificate of the Director and every such certificate to be deemed a sufficient voucher for the amount therein certified. With the cooperation of the Treasury, the Bureau of the Budget and the Comptroller General, this system proved workable for wartime purposes. That the Director of the OSS enjoyed the confidence of the Congress in managing the disposition of confidential funds is apparent from the hearings before the subcommittee on appropriations of the 78th Congress, 2nd Session on the National War Agencies Appropriation Bill for 1945, attached hereto as Appendix A. Calling attention to the requested amount of unvouchered funds the Chairman remarked to General Donovan, "....We are reposing a great deal of confidence in you."

D. Establishment of CIA and Explanation of Provisions of Public Law 110

After the war, a transitional period saw a variety of organizations before CIA, as now constituted, emerged. Section 102 of Public Law 253 of the 80th Congress, 1st Session, known as the "National Security Act of 1947", established under the National Security Council a Central Intelligence Agency headed by the Director of Central Intelligence. Subsection (d) of Section 102 charged the Agency "under the direction of the National Security Council" with the following duties"

> "(1) to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security;
>
> (2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;

(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

(4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council may from time to time direct.

(5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."

A later subsection under Section 102 transferred to CIA all of the personnel, property and records of the Central Intelligence Group which, with the Strategic Services Unit, were the transition period successors to OSS. Because the working blueprints of CIG were available, Section 102 did not purport to provide for the administrative organization of CIA. It was simply the genesis of the statutory idea of constituting a national intelligence service as a permanent addition to the executive branch of the Government. Then in 1949 came Public Law 110 of the 81st Congress, 1st Session, (The Central Intelligence Agency Act of 1949) with the necessary provisions for administering CIA so that the Agency might be able to perform the functions assigned to it. Section 10 of the Act establishing proper objects of expenditure has been set forth above.

Wartime experience with OSS in the field of unvouchered funds was relied upon in Section 10. Only a portion of the funds appropriated needed to be confidential to the extent that no outside audit should be made. Permanent legislation of this nature was necessary for the expenditure of audited funds to achieve specific objectives and to grant, where security demanded, the necessary authority for confidential expenditures. Any type of annual appropriation would have been too revealing of particular objectives and activities of the organization.

Most of the provisions of Public Law 110 deal with audited expenditures for such expenses as procurement (Section 3), education and training (Section 4), and travel allowances and related expenses (Section 5). Section 6 in part deals with the problem of transferring funds between agencies. Section 7 exempts the Agency from

reports normally required on such matters as salaries, functions, organization, or number of personnel employed. Section 8 permits the Director of Central Intelligence, the Attorney General and the Commissioner of Immigration to approve, in the interest of national security, the entry into the U. S. each year of 100 aliens and their families for permanent residence. Section 9 authorizes the Director to establish and fix compensation for not more than three positions in the professional and scientific field of the Agency.

Section 10, as quoted above, provides the authorization for the expenditure of both vouchered and unvouchered funds. Section 10(a) deals with the specific authorization for expenses in execution of the general functions of the Agency. Section 10(a)(1) designates objects of expenditure which otherwise could not be met in the face of certain statutory or other prohibitions; Section 10(a)(2) permits the Director to adopt authorities granted to other agencies where he deems it necessary. This provision has not been relied on extensively by this Agency because other authorities in Section 10 have been considered more appropriate.

Section 10(b) is the critical section for this present discussion. It can logically be subdivided into two parts. The first part authorizes expenditure of funds without regard to provisions of law or regulations. This extraordinary authority technically applies to both audited and confidential funds. This portion of Section 10 (b) extends to CIA the authority to spend that type of fund which in OSS days was characterized by the symbol .002. It was imperative in performing certain of the wartime functions of OSS that latitude be granted in the expenditure of funds.

It was the announced policy of OSS, as is now true of CIA, to employ ordinary vouchered moneys wherever practicable. When, however, such use would have gravely impeded the effective prosecution of the program directed by the Joint Chiefs of Staff, OSS had to resort to funds expendable "without regard to laws relating to the expenditure of Government funds." For example, it would have been most difficult to have performed many of the peculiar functions of OSS under mandatory compliance with laws or regulations concerning employment procedures, annual and sick leave, dual compensation, the purchase of motor vehicles, the employment of aliens, the retaining of investigators, or the securing of laborers or other personnel in various foreign countries. The General Accounting Office was willing to accept vouchers showing the expenditure of funds by OSS for such purposes providing that it was stated that such expenditures were necessary in the performance of its peculiar functions in disregard of existing law and regulation when necessary to perform its peculiar functions effectively.

The authority for the use of .002 funds, though available to CIA, has not been utilized by this Agency. CIA has operated with completely vouchered funds designated by OSS as .001 or confidential funds characterized in OSS days by the symbol .003. The second part of Section 10(b), after the semicolon, authorizes the Agency to expend funds for objects of a "confidential, extraordinary, or emergency nature," such expenditures to be accounted for solely on the certificate of the Director and every such certificate to be deemed a sufficient voucher for the amount therein certified. The words "extraordinary or emergency" enlarge greatly the traditional concept of confidential funds. CIA is thus given the widest authority for expenditure of unvouchered funds in peacetime.

E. Legislative History of Public Law 110

A necessary antecedent to the understanding of any statutory enactment is the examination of its legislative history. Such an examination often is entirely fruitless and reveals nothing of Congressional intent. Because of the nature of the mission assigned to this Agency, the history of its enabling statute, Public Law 110, reveals that its passage was entrusted to and handled by a select few in both Houses of Congress. Debate on the floor of both chambers was primarily restricted to a discussion of the necessity for Section 8 permitting the entrance of aliens for permanent residence in this country in certain situations without regard to immigration laws. A fair portion of the debate was concerned with the fact, appalling to some Congressmen, that the reporting committees urged passage of legislation on which full details had to remain undisclosed. The words "national security" and "confidential" seemed to impose the same hushed silence upon Congressmen as upon outsiders, even in the heat of the debate.

Section 10 received scant mention during the entire debate. In 1948, the CIA bill as originally drafted, had been submitted to the Comptroller General for his concurrence and had contained a provision that the amount of confidential funds made available to the Agency should be subject to the control of the Bureau of the Budget. The Comptroller General, when requested to approve this legislation, immediately responded with a letter to the Director of the Bureau. This letter stated that while, as a matter of principle, he objected to the grant of such wide exceptions from audit control, in the case of the intelligence arm of the Government he felt that the world situation made imperative the grant of the authority to expend confidential funds and that he would support the Agency in the request for such authority. (A copy of this letter is annexed hereto as Appendix B.) This Bill passed the Senate in 1948 but for time limitations was never brought to a vote in the House. In the meantime, Congress redrafted the CIA Bill to eliminate control of the amount of confidential funds by the Bureau of the Budget. When submitted

to the succeeding Congress the following year, this elimination was discussed with the Comptroller who said that while objecting to this absolute lack of control, he would not be called upon to state an objection unless specifically requested by the Congress. He was not called upon and Public Law 110 became law with his tacit concurrence.

The Central Intelligence Agency Act of 1949, H.R. 2663, was referred in both Houses of the Congress to the Committees on Armed Services. The matter of referral came to an issue during the floor debate because of the incorporation in the Act of Section 8 dealing with the extraordinary power of securing entry of aliens without regard to the provisions of existing Immigration Laws. Some strict parliamentarians insisted on the right of the Committee on the Judiciary, historically entrusted with the handling of immigration laws in the Senate, to study the legislation and be more fully appraised of the background behind it. This issue petered out in the Senate when Senator Tydings, directing floor debate, told the assembly that Senator McCarran, Chairman of the Judiciary Committee, approved the legislation in its then form. The issue evidently was just "talked out" in the House.

The reports of both Senate and House Committees were nearly identical. Of Section 10, the Senate Committee on Armed Services said:

> "Subsection 10(a) establishes a point of reference to which the administrative and fiscal officers of the Agency and other appropriate officers of the Government may look to determine what expenditures are authorized for the activities of the Agency. It permits sums made available to the Agency to be expended for the purposes set forth in the Section. This Section is necessary in view of the existing law or Comptroller General Decision, which specified that such expenditures are not permissible unless authorized by law."

"Section 10(b) permits the Agency to expend sums made available to it without regard to provisions of law. It also permits the expenditure of funds for confidential purposes to be accounted for solely by certification of the Director." Senate Report No. 106 (March 10, 1949 to accompany H.R. 2663, 81st Congress, 1st Session).

There has been annexed hereto as Appendix C certain extracts from remarks made upon the floor of the House during debate upon H.R. 2663. The quoted extracts are not pertinent exclusively to the matter of the use of confidential funds but are purposefully broader in order to demonstrate the suspect manner which certain Congressmen view legislation such as the Agency's enabling statute.

III

CONSTITUTIONALITY OF CONGRESSIONAL ATTEMPTS TO COMPEL PRODUCTION OF EXECUTIVE PAPERS OF A CONFIDENTIAL NATURE 1/

This section is devoted to an examination of the power of the legislative branch of the Government to compel the production for its examination of papers of the executive agencies and departments. We are concerned with this area of inquiry because of the current Congressional propensity to investigate.

The political history of the United States contains numerous instances where the President and executive heads of departments have refused to furnish information to Congressional committees for reasons of public interest. On each occasion where the President has supported the departmental head's refusal to divulge confidential information, the papers and information have been withheld. This uniform result stems from the fundamental proposition that governs the interrelation of the three great branches of the Federal Government; that no one of the three has the power to subject either of the other two to its unrestrained will. Weighed against this, of course, is our fundamental theory of checks and balances. Where Congressional requests have been denied or politely turned aside, the explanation of public interest has invariably been given. Former President William Howard Taft said on this subject:

> "The President is required by the Constitution from time to time to give to Congress information on the State of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest." William Howard Taft, Our Chief Magistrate and His Powers, p. 129.

The President and his departmental heads have in the past on occasion furnished classified information which the Congress sought. They have done so in a spirit of comity, not because of any effective

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1/ The background material for this section has been taken from a series of three articles, entitled Demands of Congressional Committees for Executive Papers, by Herman Wolkinson, published in the Federal Bar Journal, Volume X, Nos. 2, 3 and 4, April, July, October, 1949.

means to compel them to do so. It has become generally recognized that a subpoena duces tecum, issued by a Congressional committee to an executive head of department and calling for the production of testimony and records, need not be complied with if disclosure of contents would be detrimental to the public interest. As a practical matter, where the President has directed non-appearance, in response to the subpoena, the person summoned has so advised the committees. The more politic method has been to appear and claim privilege.

Although Congress has by statute provided the organic legislation for certain executive departments and agencies and can by law change their duties, abolish them, or withhold their appropriations, it may not use legislative power to compel the heads of such departments or agencies to act contrary to what the President finds is in the public interest. The President is the judge of the interest involved and in the exercise of his discretion must be accountable to the country and his conscience. The executive branch of the Government is intended to assist him in the execution of his responsibilities.

There is annexed hereto as Appendix D. an historical summary of certain occasions where the legislative has sought confidential executive papers or information and has been refused. One of the most recent of these occasions involved an attempt by the Joint Committee on Reduction on Non-essential Federal Expenditures to obtain personnel figures of this Agency. Security complications were avoided by a prudent disclosure to the Chairman of the Committee.

IV

JUDICIAL DOCTRINES OF DISCOVERY AS APPLIED TO DIPLOMATIC, STATE AND MILITARY SECRETS

The previous section of this study summarized the historical occasions on which the legislative branch of the Government sought disclosure of confidential information from the executive. This section is concerned with those situations where the aid of the judiciary in litigation between private parties or against the Government itself or some official thereof has been solicited in securing such disclosure.

Although this study is basically one of the use of confidential funds, the problem of judicially compelled disclosure of the uses and sources of such funds cannot be separated from the disclosure of other material of an equally confidential nature. For this reason the attack upon expenditures is frequently incidental to the assault upon the purpose for which the expenditure is made. If the purpose is proper, with room for debate as to excessive amounts, the disbursement of the funds themselves will in all likelihood be proper. The pure problem of funds does thus not usually arise in the judicial area.

Marbury v. Madison. In the leading case of Marbury v. Madison, 1 Cranch 137 (1803), the plaintiff, Willaim Marbury, was seeking by mandamus to compel Secretary of State James Madison to issue his commission as one of John Adams' "midnight judges." Although the appointment had been made just prior to the assumption of the Presidency by Jefferson the commission had not been issued by John Marshall, Madison's predecessor as Secretary of State during the Adams' administration. Marshall, in the meantime, had become Chief Justice of the United States and sat on the case. The Attorney General was summoned for questioning and objected to answering one question as to the disposition of the commission, attributing his refusal to his obligation to the executive. The Court stated:

> "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control

that discretion. The subjects are political: They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." 1 Cranch 137, 164.

"The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 1 Cranch 137, 170.

The court decided that if intrusion into cabinet records was not involved, if the matter respected papers of public record and to a copy of which the law gave a right on payment of a small amount, and if the subject in issue was not one over which the executive can be considered as exercising control, a citizen may, as to such a paper, assert the right given him by an act of Congress. The court could issue a mandamus directing performance of a ministerial duty not depending on administrative discretion but on particular acts of Congress and the general principles of law.

As to the action prayed for, the court held that the Secretary of State was subject to the writ of mandamus but denied the writ on the ground that the provision of the act of Congress giving the original jurisdiction under which the suit had been brought was unconstitutional.

The trial of Thomas Cooper for seditious libel in the Circuit Court of Pennsylvania in 1800 produced a request for a subpoena to issue directed against the President of the United States, John Adams, who was the person allegedly libelled. The court refused to issue the subpoena and preemptorily informed the defendant that if he undertook to publish a false libel against the President without having proper evidence before him to justify his assertion, he would do so at his risk. This appears to be the first recorded instance of an effort to compel a President of the United States to produce a document at a court trial.

In the famous trial of Aaron Burr in 1807, President Jefferson was directed by a subpoena duces tecum to produce a certain letter alleged to contain information helpful to the defense. Judge Marshall allowed the subpoena stating that the President was not exempt per se from process, although he was free to keep from disclosure such as he deemed confidential. Marshall evidently overlooked the Chase opinion in the Cooper case. The Burr trial produced for the first time judicial consideration of the problem of official records being subjected to public disclosure. Marshall's ruling has not been followed by subsequent court decisions nor adhered to by the Presidents

themselves. Marshall indicated that he believed the power of the court fell short of direct compulsion of the President to produce.

Jefferson refused to acknowledge the subpoena denying the right of the judicial branch to order him as President to do anything. The letter requested was given by Jefferson to the Attorney General with instructions to keep out of court so much as the U. S. Attorney deemed confidential. Jefferson subsequently stated his fundamental legal position as follows:

> "He, of course, (the President) from the nature of the case, must be the sole judge of which of them the public interest will permit publication. Hence, under our constitution, in request of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed." Letter of June 17, 1807 to U. S. Attorney Hay, Thomas Jefferson Writings, (Ford), Volumn 9, Page 57.

Jefferson was prepared to resist by force if necessary an attempt to obtain the papers which Burr sought. Quite fortunately the issue was not pressed either as to the President himself or to the Secretaries of War and Navy, who also were directed personally to attend.

Totten, Adm'r v. U.S. The case of Totten, Administrator v. U. S., 92 U.S. 105 (1875), involved an action for payment for services alleged to have been rendered by one William A. Lloyd under a contract with President Lincoln. The services included travel behind the Confederate lines for the purpose of ascertaining the number and disposition of Confederate troops and the plans of Confederate fortifications. Lloyd accomplished his mission with considerable success and made full reports of his findings to the Union authorities. The Court of Claims found that the services were rendered as alleged and that Lloyd was only reimbursed for his expenses. The Supreme Court in denying recovery on the contract stated at page 106:

> "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employee and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. The condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

The court went on to say that secrecy was a condition of the agreement and that the disclosure of the information necessary to the maintenance of the action defeated recovery. The opinion continued at page 107:

> "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."

De Arnaud v. U.S. In the later action of De Arnaud v. United States, 151 U.S. 483 (1894), presenting the question of whether "secret services" were to be distinguished from a "military expert services", the Supreme Court had occasion to consider an appeal from a Court of Claims judgment dismissing a complaint in which $100,000 was sought for services rendered by De Arnaud as a "military expert" employed for "special and important duties" by General Fremont for and in behalf of the Union Army. De Arnaud was a Russian, resident in the United States, with prior experience as a Lieutenant of Engineers in the Russian Army. In 1861, Fremont had employed him to pass through the enemy lines, observe the order of battle, and report back. His mission resulted in the saving of Paducah, Kentucky. He was paid $600.00 for his services on a receipt marked "for special services rendered to the U. S. Government in travelling through the rebel parts of Kentucky, Tennessee . . . which led to successful results." His claim was supported by certificates from Generals Grant and Fremont. President Lincoln ordered the claim paid if just and equitable. The Secretary of War paid De Arnaud $2000 which was received under protest although the receipt acknowledged payment in full. Subsequently, De Arnaud instituted an action in the Court of Claims.

The Supreme Court could recognize no distinction between "the secret services" rendered in the Totten Case and the "military expert services" which De Arnaud claimed to have rendered. The receipt which De Arnaud signed was considered to operate as a bar to any further demand. At page 490 of the opinion, the court stated: "Accounting officers have no jurisdiction to open up a settlement made by the War Department from secret service funds and determine unliquidated damages."

Opinion of Atty. Gen. Speed. In 1865, Attorney General James Speed advised President with regard to the Secretary of Navy's liability to respond to individual or state requests for the production of exemplified copies of military courts-martial records:

> "Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and the subordinates are, in general, treated as 'privileged communication.' The President of the U.S., the heads of the great departments of the Government, and the Governors of the several states, it has been decided, are not bound to produce papers or disclose information communicated to them when, in their own judgment, the disclosure would, on public considerations, be expedient. These are familiar rules written down by every authority on the law of evidence." 11 Op. A. G. 137, 142 (1865).

Opinion of Atty. Gen. Jackson. In April of 1941, Attorney General Jackson was requested by the Chairman of the House Committee on Naval Affairs to furnish all Federal Bureau of Investigation reports since June 1939, together with "all future reports, memoranda, and correspondence, of the Federal Bureau of Investigation, or the Department of Justice, in connection with investigations made by the Department of Justice arising out of strikes, subversive activities in connection with labor disputes or labor disturbances of any kind in industrial establishments which have Naval contracts, either as prime contractors or subcontractors.

Attorney General Jackson's opinion, printed in 40 Op. A. G. 45 (April 30, 1941), stated in part:

> "It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest . . . "
>
> "Disclosure of the reports at this particular time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country. For this reason we have made extraordinary efforts to see that the results of counterespionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue

of persons under investigation or suspicion, and what we know about them, would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

"Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal bureau of investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants--sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard this keeping of faith with confidential informants as an indispensable condition of future efficiency." 40 Op. A. G. 45, 46, 47.

. . . . . .

"This discretion in the executive branch (to withhold confidential information) has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine." (40 Op. A. G. 45, 49)

Accordingly Jackson refused to divulge the requested information.

U.S. v. Curtiss-Wright. In the case of the U. S. v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936), the Supreme Court was called upon to determine the constitutionality and legality of an indictment charging violation of a joint resolution of Congress, and a Presidential proclamation issued pursuant thereto, which forbade the shipment of arms or ammunition to foreign nations engaged in armed conflict in the Chaco. The case arose on a demurrer to the indictment and in part challenged as an improper delegation of power the unrestricted scope of executive action without adequate standards imposed by the Congress. In speaking of the exclusive province of the executive in the area of intercourse with foreign nations, the Court said at pages 319 and 320:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems,

the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." . . .

"It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty--a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:

> 'The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.' 1 Messages and Papers of the Presidents, p.194"

Chicago & Southern v. Waterman SS. A more recent case has come down from the Supreme Court on the problem of the exclusive domain of the executive. The case of Chicago and Southern Air Lines v. Waterman

Steamship Corporation, 333 U. S. 103 (1948), arose on an appeal from a denial by the Civil Aeronautics Board of a certificate of convenience and necessity for an international air route to Waterman and the award of the same to Chicago & Southern. The award could be made only with the express approval of the President.

On this question, the court said:

> "The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 US 433, 454; United States v. Curtiss-Wright Corporation, 299 US 204, 319-321; Oetjen v. Central Leather Co., 246 US 297, 302. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department. 333 US 103, 111, 112."

It might be noted that the Waterman case was a 5-4 decision. Notwithstanding, it still is good law today. "The issue...involves a challenge to the conduct of diplomatic and foreign affairs, for which the President is exclusively responsible." Johnson v. Eisentrager, 339 US 763 (1950), at page 789, citing both the Curtiss-Wright and Waterman cases. "It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 US 580, 588, 589, (1952), again citing the Curtiss-Wright and Waterman cases.

The case law abstracted above points to the general principle that the judiciary is loathe to intervene in the area of foreign policy determinations and secrets of state. Substantive content is privileged to such an extent that courts sitting in camera are often unwilling to determine in the first instance whether the privilege should be applied. The basic principle is complicated, however, by the considerable body of law that has grown up out of the liberal discovery procedures postulated in the Federal Rules of Civil Procedure. Rule 26(b) provides:

> "(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Two very recent cases will serve to highlight the difficulty that these liberal rules of discovery present. Reynolds v. United States, 192 F. 2d 987 (3rd Cir. 1951), involved three separate civilians killed in a crash of an Air Force plane. The actions were consolidated and the District Court rendered judgment for the plaintiffs from which the United States appealed. The Circuit Court held that good cause had shown by the plaintiffs for the production of documents and that the documents therein sought, i.e. official reports of the investigation authority, were not privileged.

The United States in answer to interrogatories had declined to furnish a copy of the accident report. Following the filing of this answer the plaintiffs made a motion under Federal Civil Procedure Rule 34 for production of the official investigation report and the statements of surviving crew members. Supporting affidavits stated these documents were essential to the preparation of the case and that the plaintiffs knew no way to obtain the information other than by their production. The plaintiffs' motion was sustained and an order for production issued.

At the request of the Secretary of the Air Force, a hearing was held on this motion at which a formal claim of privilege was filed setting forth the basis for the claim and the authority for the privilege supported by his affidavit showing his statutory right to

promulgate regulations governing the withholding of confidential information. Names and addresses of survivors were also made available. An amended order issued by the District Court directing that the content was not privileged or disclosure against the national or public interest. The United States refused to comply. Whereupon the court issued an order under Rule 37 taking the facts in the plaintiffs' favor on the issue or negligence as established and prohibiting the defendant from introducing evidence to controvert those facts. The Government appealed. On appeal judgment was affirmed.

The only question presented on appeal was whether the legal duty of the Secretary under the Federal Tort Claims Act was to make the requested disclosure in order that the Court could determine whether the refusal to do so justified the order by the district court under Rule 37(b)(2) that the negligence of the Government be taken as established.

The Court found that the Congress expressly intended that the United States be divested of its normal sovereign immunity to the extent of making it liable under the Federal Tort Claims Act in the same manner as if it were a private individual. See 28 USC 2674. "We think that by so doing Congress has withdrawn the right of the executive departments of the Government in tort claims cases, even if under other circumstances such right exists, to determine without judicial review the extent of the privilege against disclosure of Government documents sought to be produced for use in litigation..." 192 F 2d 987, 993.

The Court then proceeded to discuss the claim of privilege asserted and found that the public interest in seeing that justice was accorded persons injured by Government operation outweighed the convenience to the Department of the Air Force in the conduct of accident investigation in not imposing a requirement of disclosure.

The Court found an analogy in the Tort Claims Act to those criminal cases where the Government is compelled to elect to reveal all the evidence within its control or let the offense go unpunished. In tort claims cases the Government may decide to recognize the public interest involved in affording justice to the claimant and grant disclosure or it may decide to give priority to the public interest which it believes to be involved in preserving the documents from disclosure by declining to produce them upon the order of the court at the cost, if its claim of privilege is overruled, of having the facts to which the documents are directed taken by the court to be established against the U. S. under Rule 37(b).

The Secretary of the Air Force inserted a second basis for his formal claim of privilege than the one originally propounded, that sound investigation required that witnesses be given absolute

freedom to state all that they knew without fear of disclosure of source or information. The additional ground was that state secrets of a military character were involved. To this the court replied that "state secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding and unquestionably come into the class of privileged matters referred to in Rule 34," citing the Totten case discussed above. The Government's interest is protected fully by the fact that the district court judge sits in camera in ruling on permissible privilege. The Court distinguished the British House of Lords case of Duncan v. Cammell, Laird & Co. (1942) A. C. 624, on the ground that the plans of the submarine Thetis there involved were obviously military secrets. This alone would have disposed of the point but even if not controlling, our governmental system of checks and balances would have been.

It is hard to say whether the Reynolds decision would have application outside the field of tort claims against the Government under the Federal Tort Claims Act. The Director of Central Intelligence is charged with the statutory duty under section 102(d)3 of the National Security Act of 1947 of protecting "intelligence sources and methods." It would seem that this responsibility created by Congressional enactment would preempt the public interest of according justice to the individual because of the national interest involved. From the practical standpoint it would doubtless be necessary to satisfy certain district court judges that "intelligence sources and methods" were involved. In certain areas of operation of this Agency this might present considerable difficulty. It would be impossible to delineate a happy formula for the solution of all problems of this type. Individual cases would have to be resolved on the basis of their particular facts. It is interesting to speculate as to the result when in litigation between private parties, discovery was sought from the government under circumstances where to the district court the national interest was obscure and the need for concealment of intelligence sources and methods not apparent. A clearer answer may be available when the U. S. Supreme Court renders a decision on the Government's appeal in the Reynolds case.

A very recent District Court case involving a criminal prosecution under the Sedition Laws held that the public policy militating against disclosure must be weighed against the interest of the accused in having the document for use in his defense. See U. S. v. Schneiderman, Vol. 21 U. S. Law Week. (D.C. S. Cal. July 23, 1952).

Despite the disturbing implication of the Reynolds case, it is safe to say that the Federal Rules of Civil Procedure leave intact the basic doctrines of the law of evidence. Where the material in question is of a secret or confidential nature in the accepted military or diplomatic sense, then of course the Agency need not disclose it and the cases so hold. See Pike, Discovery Against Federal Administrative Agencies, 56 Harv. L. Rev. 1125 (1943).

There still appears a reluctance on the part of the judiciary to decide the question of privilege when the existence of state and military secrets is self-evident. As has been shown, this doctrine has had recent support from the United States Supreme Court.

However, when the existence of such privileged facts is not obvious, the provision for liberal discovery procedure in the Federal Rules has tended to persuade the judiciary that the trial judge sitting in camera should be constitutionally entitled to personal examination of the disputed evidence to determine the basis for privilege. See Berger and Krash, Government Immunity from Discovery, 59 Yale L. J. 1451 (1950). When claims under the Federal Tort Claims Act are involved the Government is always permitted the alternative of ignoring the court order and allowing its negligence to be taken as established.

V

RELATIONSHIP WITH THE GENERAL ACCOUNTING OFFICE

The seemingly unlimited power granted the Director for the expenditure of Agency funds does have practical limitations. In the first instance, the Congress specifies those funds which may be expended solely upon the certification of the Director without external audit. In the second, because of Congressional control of appropriations, policy dictates that the Agency operate from vouchered funds to the maximum extent possible consistent with security requirements. This policy consideration imposes a most effective restraint upon the use of confidential funds. Its ramifications are multifold.

In the field of vouchered funds the area of discretion becomes more limited. Despite the phrase "notwithstanding any other provisions of law" in the introductory to Section 10(a) of Public Law 110, the normal rules controlling the use of public funds to an extent remain applicable. One outstanding example is the published decision of the Comptroller General (31 Comp. Gen. 191) on the authority of the Agency under the Retroactive Pay Statute of 1951. A portion of this decision is annexed hereto as Appendix E. Such sums as the Director may expend from vouchered funds must be "expended for purposes necessary to carry out its (CIA's) functions." Within this framework, the Comptroller General has freedom of judgment to interpret Congressional intent. The cited opinion is clearly in point.

The General Accounting Office was established in 1921 to correct abuses resulting from a situation where the auditing function was exercised by the Executive, the spending branch of the Government. Congress created the General Accounting Office (42 Stat. 23, 31 USCA 41) as an "establishment of the Government" "independent of the Executive Departments" and under the control and direction of the Comptroller General of the United States. The creation of the General Accounting Office in this manner has been a subject of discussion ever since as, under our system of the Constitutional division of powers, the situation is anomalous. The Comptroller General was empowered to except to the accounts of certifying officers of the Executive, thus effectively preventing reimbursement from Treasury funds pending proper rendition of accounts. Furthermore, he was authorized to prescribe accounting procedures and resolve claims against the Government. He is in no way under the Executive nor is he a part of the judiciary. In certain cases, he has refused to accept a judicial opinion except as applied to specific facts properly before the Court in a given case. He has considered himself and is officially so regarded as an arm of a legislative branch primarily

responsible to Congress. (See statement of Lindsay C. Warren, Comptroller General of the United States, before the Joint Committee on Atomic Energy during Hearings on the Atomic Energy Act of 1946, annexed hereto as Appendix F, Page 1). His authorities are very broad and his power, both statutory and practical, is very great. The Comptroller has himself held that determinations whether expenditures are authorized by law and are made for the objects or purposes for which the appropriations sought to be charged are available are exclusively for the Comptroller General of the United States and may not be adjudicated by any court. 3 Comp. Gen. 545 (1924).

Since the establishment of the General Accounting Office, a closer eye has been kept on the grant of the authority to expend confidential funds. Where Congress, after consultation with the Comptroller General, has authorized the certification of confidential expenditures, the Comptroller General has accepted the fact that the signature of such an official is a complete accounting for the sums stated in the voucher.

Under Section 291 of the Revised Statutes, presently incorporated as Section 107 of Title 31 of the USCA, discussed in Section II of this study, questions have arisen from time to time as to the legality of the form of certificate filed by the Secretary of State with the GAO. One published decision of the Comptroller General has indicated that if the voucher discloses sufficient of the nature of the expenditure to rebut a presumption of its confidential character, a certification of the Secretary of State that the public interest forbids disclosure will not suffice.

This decision published in 2 Comp. Gen. 121 involved a voucher for $596.40 submitted by the Secretary of State to be paid out of funds appropriated for "emergencies arising in the diplomatic and consular service, 1921" and which showed that the money was to be paid because of a deficiency in another appropriation which the Secretary then proceeded to describe in full. The Secretary, by direction of the President, certified the voucher under the provisions of Section 291, Revised Statutes, stating that it was an expenditure "the nature and object of which .... it is deemed inexpedient to make known."

The Comptroller General disallowed the voucher on the ground that "the character of the expense having been fully disclosed by the vouchers....neither the letter nor the purpose of the statute and appropriation extends them to alter allowance of payments in excess of regularly made specific appropriations which have been regularly accounted for on vouchers specifying the exact nature and amount of the expense....The letter of the law is to the effect that the Secretary may make a certificate of the amount of such

expenditure as he may think it advisable not to specify. The certificate in question specifies with particularity the exact expenditures which this certificate is designed to cover, thus conclusively negativing any assumption that the expenses were of the confidential character contemplated by the intent and purpose of the law, which is to protect expenditures which the policy of the State Department requires shall not be made public."

At page 123 of the same opinion, the Comptroller General stated, "Speaking generally and without reference to the facts and certification in the instant case, I may say that this office recognizes to its full extent the discretionary power conferred upon the Secretary of State by Section 291 of the Revised Statutes and in no case will a certificate made by the Secretary in conformity with the provisions of that section and in support of a payment from the supporting appropriation be questioned by this office."

A more narrow construction of the same statute was made by Comptroller General J. R. McCarl in an unpublished letter to the Secretary of State, dated 15 September 1932 (filed with the GAO, MS Volume 133, Page 1068.) The Secretary of State certified three vouchers under provisions of Section 291 of the Revised Statutes which showed on their face that they were in payment of passage on a foreign vessel for the Secretary himself, and three other individuals. The Comptroller refused to allow the vouchers on the ground that travel on a foreign vessel while on official Government business was in violation of Section 601 of the Merchant Marine Act of May 22, 1928, 45 Stat 697.

The Secretary of State resubmitted the vouchers with a letter stating: "You are advised that in view of the specific circumstances in connection with the trip the account was paid from the appropriation for 'emergencies arising in the diplomatic and consular service, 1932' and that because of such circumstances connected therewith was accounted for by certificate of the Secretary of State under Section 291 of Revised Statutes."

The Comptroller General replied: "In view of the fact that the vouchers submitted for pre-audit disclose that the passage of George A. Morlock, Captain Eugene A. Regnies, Allen T. Kotz and yourself, were upon the SS VULCANIA, a vessel of foreign registry, the certificate under Section 291, Revised Statutes, that the nature and object of which expenditure it is deemed advisable not to specify, is not understood. Certainly, the Congress had no intention that Section 291 of the Revised Statutes and the appropriation for emergencies arising in the diplomatic and consular service,....should be used to avoid or circumvent a statutory prohibition as in Section 601 of the Merchant Marine Act or to avoid the use of a specific appropriation for expenses if properly chargeable thereto."

The opinion went on to state that the statutory directive to the Comptroller General to "specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law" (Section 312(c) of the Budget and Accounting Act of June 10, 1921, 42 Stat. 26) equally applied to purported certificates of unvouchered expenditures which on their face indicated unlawful disbursement.

The general language of the first cited opinion contains helpful language in so far as this Agency is concerned with regard to the Comptroller General's reaction to certification by the Director of the expenditure of confidential funds couched in the exact language of the statutes.

One further decision of the Comptroller General might be briefly noted as it affects certification under Public Law 110. This is an opinion addressed to the Secretary of the Navy reported at 10 Comp. Gen. 404. Section 108 of Title 31 USCA (39 557, August 29, 1916) carries the proviso "that hereafter expenditures from the appropriation for obtaining information from abroad and at home shall be accounted for specifically, if, in the judgment of the Secretary of the Navy that may be made public, and he shall make a certificate of the amount of such expenditures as he may think it advisable not to specify, and every such certificate shall be deemed a sufficient voucher for the sums therewith expressed to have been expended." The cited case concerned a certificate submitted by the Secretary of the Navy with respect to funds advances or expenditures "to be made". The opinion held that advances, if any are made from funds available for the purpose, are subject to the same accounting requirements as other advances of public funds, except as otherwise specifically provided by the Act of August 29, 1916 (31 USCA 108), applying only to expenditures made as distinguished from advances.

In regard to this distinction, Section 10(b) of Public Law 110 provides that "such expenditures (for objects of a confidential, extraordinary or emergency nature) shall be accounted for solely on the certificate of the Director." It is necessarily impractical for this Agency to adhere to an inflexible doctrine establishing the division between expenditure and advance. However, it has been desirable in the past and would seem desirable in the future that any extraordinary situations presenting apparent reasons justifying a departure from traditional fiscal concepts surrounding the meaning of these two terms be informally discussed with the Comptroller General. In any event certification under Section 10(b) should be in strict accordance with statutory terminology.

As a general proposition it may be stated that the Comptroller General did not take exception to the large confidential appropriations in World War II. At the cessation of hostilities he had

opportunity to make a position clear with respect to the peacetime extension of the power to expend unvouchered funds. The proposed Atomic Energy Act of 1946 originally contained no provision for the certification by the Chairman of the AEC of the expenditure of confidential funds without disclosing the nature of those expenditures. The proposed law would have permitted the AEC to determine its own system of administrative accounts and prescribe its own forms and contents of its contracts and other business documents. The Comptroller General was given the power of audit with appropriate access to books and records, but was deprived of the power to disallow credit for or withhold funds because of any expenditure which the Commission itself should determine and certify to have been necessary to carry out the provisions of the Act.

Mr. Warren termed this a "joker" and "fraud", robbing the GAO of any effective power of audit. Mr. Warren felt very strongly that he should be invested with the discretion to determine what was necessary to effectuate the purposes of the Act, not the Commission that was spending the money. With some reluctance he conceded a possible means for the AEC to have power to expend confidential funds, but by no means welcomed the incorporation of such a provision to the statute (see Appendix F attached hereto for extracts from the statements of Lindsay C. Warren, Comptroller General of the United States and Major General Leslie R. Groves before the Special Committee on Atomic Energy).

Mr. Warren's misgivings about improper use by the AEC of its confidential funds have in one instance been justified. (See extract from the 24th Intermediate Report of the Committee on Expenditures in the Executive Departments annexed hereto as Appendix G).

Within two years of his statements before the Joint Committee on Atomic Energy, Mr. Warren was requested to approve proposed legislation which subsequently was enacted as the CIA Act of 1949. Of the provision granting the Director of Central Intelligence the power to certify the expenditure of confidential funds, Mr. Warren stated that he believed it provided "for the granting of much wider authority than he would ordinarily recommend for Government agencies generally.....the purposes sought to be obtained by the establishment of the Central Intelligence Agency are believed to be of such paramount importance as to justify the extraordinary measures proposed therein." As of this date, the Comptroller General has not had occasion to complain of an abuse of the trust reposed in the Director of Central Intelligence.

VI

HISTORICAL INSTANCES OF THE USE OF CONFIDENTIAL FUNDS

The recorded instances in the history of the United States of the use of confidential funds in the intelligence area are not many. There are, however, sufficient documentations to establish that their use dates back to American Revolutionary times. Criticism of such use goes back nearly as far.

Attached hereto as Appendix H are extracts from a report of a Congressional Committee headed by Representative Nicholson to the House of Representatives, dated April 29, 1802, critical of War Department expenditures, and a reply to the charges in the Nicholson report by Secretary of the Treasury Wolcott. The Committee charges arose out of expenditures for "secret service" which were contended to have been made without authority of law. The Committee argued that the Act of February 9, 1793, giving the President authority to account for money drawn from the Treasury for the purpose of "intercourse with foreign nations", to be accounted for in those situations, where the public interest required, solely upon his or the Secretary of State's certificate, did not extend to cases of expenditures of secret service unrelated to such foreign intercourse. This Act of February 9, 1793, is the forerunner of Section 291, Revised Statutes, now incorporated as Section 107 of Title 31 U.S.C.A. The Committee expressed surprise that the policies embodied in that Act should be extended to expenditures of the War Department.

Secretary Wolcott answered in strong language maintaining that expenditures for the military secret service, apart from the fact that they were of a very small amount, must by their very nature be kept from public disclosure and that withholding of such information was in no way inimical to the democratic theory of government.

The outcome of the reported clash is not recorded. It is fair surmise to say that it ended as has every other attempt by the Legislative to compel Executive disclosure, with Congress threatening but in the final analysis accepting the applicability of the doctrine of separation of powers.

During the Civil War, the problem of financing the secret service again arose. The imbedded hostility to the use of confidential funds had in no way abated. Brigadier General G. M. Dodge was charged with the duty of recruiting, organizing and directing such a service in the Western states. He achieved considerable results, but endured relentless criticism of his financing methods because of his obdurate refusal to break the confidence of his agents by revealing

names and amounts paid. Denied necessary funds by the Quartermaster, he was compelled to resort to confiscating cotton crops in the South, selling them at public auctions and devoting the proceeds to the payment of his agents. Extracts from his biography, Trails, Rails and War, The Life of General G. M. Dodge by J. R. Perkins, are annexed hereto as Appendix I. It is extraordinary to realize that approval of the General's accounts was not forthcoming for 19 years.

Scattered evidence of the use of confidential funds by European intelligence services are available. The British War Office in 1904 published a code of regulations for the conduct of intelligence duties in the field. Several paragraphs of these pertain to the financial accountability and methods of intelligence officers. These are contained in Appendix J annexed hereto. At the bottom of page 5 and the top of page 6 of this appendix, it will be seen that careful attention is drawn to the demand for great discretion in the preparation and forwarding of reports on secret service expenditures, so necessary in certain cases because of the risk of compromise of identity, that a simple certificate of proper expenditures was sufficient.

Continental intelligence services have had the advantage of long experience operating in the area of foreign intelligence. European history does not record many extended periods where wars of greater or lesser magnitude were not threatened. By contrast the decennial anniversary of a national intelligence service in this country has not yet occurred. European leaders know only too well that past failures in intelligence have proved costly and in many cases disastrous and decisive. Hitler, despite innumerable psychotic short-comings, realized the paramount need for efficient intelligence advice, whether utilized or not, and above all was prepared to make the concession that his secret service could not attain the desired efficiency without complete freedom from financial restraint. Whether complete figures expended by Col. Nicholai's organization ever became available, it is safe to say that German intelligence expenditures both in the collection and the operation of all phases of psychological, economic, scientific and political warfare were enormous. In this connection see Appendix K annexed hereto, containing extracts from Intelligence by S. Theodore Felstead (Hutchinson Company, London 1941).

No history of the use of confidential funds by the Office of Strategic Services during World War II has as yet been made publicly available. However, there is in the archives of this Agency a documentary report of the activities of the special funds branch of OSS which relates in some detail the story of the use of confidential funds by that organization during World War II. OSS and its German counterpart, because of war time emergencies were sustained by appropriating authorities mindful of need for financial freedom and not seriously curtailed by peace time economies.

CIA, as heretofore related, has not entirely escaped the inquisitive search of the Congress, but to date the problem of escape by classification has not been focused upon us to the extent it has upon the military. See extracts from Douglas, Economy in National Government (Chicago University Press 1952), annexed hereto as Appendix L.

VII

CONCLUSIONS

The fundamental difficulty pointed up by the foregoing sections of this study is the determination of available guide-posts for present and future reference for assisting the financial conduct of the operations of this Agency. Ultimately, the source for the answers must be the enabling statutes, the National Security Act of 1947 and the CIA Act of 1949, together with the Confidential Funds Regulations which the Director has promulgated to define those objects for which confidential funds may be expended and the manner in which such expenditures should be made and accounted for.

Section 102(d)(3) of the National Security Act of 1947 charges the Director with the "protection of intelligence sources and methods." Necessarily such protection requires that certain operations be conducted in a covert manner and that funds allocated thereto be confidential. The National Security Act of 1947 thus by implication gave the authority for the expenditure of confidential funds which was not conferred directly until the enactment of Public Law 110. Section 10 of this law is set forth in full in the second section of this paper.

Sums expended under the second part of Section 10 (b) of the CIA Act of 1949 from confidential funds and accounted for solely on the certificate of the Director must be of a "confidential, extraordinary or emergent nature." Since the responsibility for final certification of confidential funds rests with the Director, the interpretation must be his as to which objects are of a qualifying nature. The determination of those objects that meet this description is seldom an easy one. This imposes a tremendous fiduciary obligation upon the Director to see to the proper expenditure of such funds. This is necessarily so because no one is empowered to look behind the certificate.

Even a casual reading of the preceding sections of this paper inescapably leads to the conclusion that there does exist a risk that a searching inquiry, either legislative or judicial, may some day be made into the uses that this Agency makes of its confidential funds. Because of its disastrous consequences, the danger of such an inquiry cannot be minimized. Reliance upon judicial doctrines and the constitutional theory of the separation of powers is entirely inadequate. Certain Congressmen, jealous of their appropriating powers and antagonistic to the concept of secrecy, would like only too well to discover an abuse of the power to expend confidential funds as an excuse for attempting to withhold some of the money necessary to support the existing operations of this Agency and the inauguration of new ones.

Quite obviously it is impossible for the Director himself to supervise, approve or disapprove each expenditure of confidential funds. Apart from being administratively ridiculous, such a task would be physically impossible. Through the medium of the Confidential Funds Regulations he has prescribed rules for the disbursement of such money and, save for the extraordinary situation, has delegated the duty of approving such disbursement.

The following sections from these Confidential Funds Regulations are pertinent for purposes of this study:

1.0 Definition - Confidential funds are those made available by the Congress which may be accounted for to the Treasury Department and the General Accounting Office on standard vouchers bearing only the certification of the Director that the amounts indicated thereon actually have been expended, and that in view of the confidential, extraordinary, or emergent nature of such expenditures, it would be prejudicial to the public interest to disclose details of the transactions. For the purpose of this regulation, "confidential funds" shall also include all foreign currencies, money, or negotiable instruments purchased with confidential funds or acquired as a result of unidentified collections, appreciation or gain through exchange, interest or dividends on deposits or investments, or sale of assets.

1.2 Use - Obligation and expenditure will be only for necessary official government purposes:

a. Generally in accordance with laws and regulations governing vouchered funds, the primary purpose being to preserve security of operations and personnel; or

b. For special purposes in connection with acquisition, evaluation, and dissemination of intelligence information or special services incident to CIA responsibilities as specifically provided herein, or;

c. As otherwise authorized by the Director.

10.12 General Expenditure - When authority is not otherwise specifically provided in these regulations, the Deputy Director (Administration) may take final action on any matter involving the expenditure of confidential funds, if the expenditure involved in each matter does not exceed $2,500.

14.0(a) It is necessary that the Central Intelligence Agency fix and establish policies and principles pertaining to the rights, privileges and benefits of its personnel which will

assure that all individuals receive fair and equitable treatment and that no employee or agent serving the Agency shall be arbitrarily deprived of any substantive benefit to which he is by right entitled.

As must be apparent, the basic consideration in the expenditure of confidential funds is security. There must, of course, be compliance with the statutory and regulatory provisions that the object of the expenditure be of a confidential, extraordinary or emergent nature. Announced administrative policy within this Agency as set forth in CFR 1.2(a) states that confidential funds will be obligated and expended "generally in accordance with laws and regulations governing vouchered funds, the primary purpose being to preserve security of operations and personnel." In many situations this declaration of policy immediately injects the necessity for legal interpretation and decision to determine the applicability of laws and regulations. See CIA Notice 103-52, attached hereto as Appendix M.

Necessarily operations with the scope of this Agency's must be beyond the pale of laws and regulations. Congress clearly intended that the Agency be enabled to act as a mature intelligence service. For this reason, the justification for confidential expenditures in the purely operational area is clear. The difficulty arises when an attempt is made to differentiate expenses of a purely operational character from those of an administrative nature.

CFR 14.0(a) states in part that "no employee or agent serving the Agency shall be arbitrarily deprived of any substantive benefits to which he is by right entitled." The word "right", as therein used, is presumably implicitly modified by the words "statutory, regulatory or contractual." The legal problem in the purely administrative area is often to determine whether a substantive benefit is involved. If so, security considerations may justify the use of confidential expenditures.

In the border line cases where there is reasonable difference of opinion whether a complicated expenditure would be better characterized as operational than administrative, a more complex problem arises. It is primarily a policy determination whether a particular expenditure is peculiar to the operational needs of the Agency, unless its justification on that ground alone would be in violation of existing laws or regulations. This approaches the area where despite the Agency's "power" to make a proposed disbursement, there is lacking the legal "authority" to do so. The resort in every doubtful case to the operational subterfuge inevitably tends to break down accepted standards and announced policies for expending government funds in compliance with general laws and regulations. To this extent individual cases present mixed questions of policy and law with

which both the legal and the auditing functions are concerned. Of interest in this regard is Appendix N, annexed hereto, which comprises a portion of a statement of concept of function to which the finance office of this Agency attempts to adhere in the application of its auditing procedures.

Where, under existing laws and regulations, a substantive right is involved and security considerations exist, it is of no account, in determining the propriety of the expenditure of confidential funds, that the expense may not be peculiar to the Agency's functions. The substantive consideration is justification enough. Where no such right is involved, policy decisions to employ confidential funds must be weighed against the background of applicable laws and regulations. In resolving possible conflicts between operational necessity and lack of legal justification, the elements of security, time, benefit to the Agency, and availability of alternatives must be considered. Expediency alone should never be justification for such an expenditure.

In summary, it can be stated that precedents for the determination of the propriety of a contemplated expenditure of the confidential funds in a given situation will often be non-existent, and even where available, cannot necessarily be controlling because of operational needs. Convenient formulas for individual cases cannot be had. It would be impossible to prescribe regulations to anticipate every case. Section 10.12 of the Confidential Funds Regulations has in the past often been resorted to as a final escape to permit payment in those cases where no legal basis could be found and yet the individual equities were outstanding. Unless the historically established standards for government expenditures are to be disintegrated, there must be strong resistance to the use of this means to dispose of the "charity" cases. The price for the abuse of administrative discretion is far too costly.

25X1A6a

In conclusion the pointed impact of the following quotation from the War Diary of the [redacted] special funds branch of OSS should be noted. "Whereas money is the very core of a successful intelligence chain, it may also prove to be the most dangerous single element whereby that chain may be rendered valueless and sterile. In conversations with persons of long experience with the handling of agents' funds, one fact will always stand out: Invariably when an agent is "blown" he is "blown" because he has been unwise in the use of money."

Extracts from

Hearings before the

SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS

Seventy-Eighth Congress, Second Session

on the

NATIONAL WAR AGENCIES APPROPRIATION BILL FOR 1945

OFFICE OF STRATEGIC SERVICES

* * * * * * * * * * * * * * * * * * * *

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25X1A1a

The Chairman: The unvouchered funds for 1944, [redacted] and those asked for 1945, [redacted] are large sums to be placed at the disposal of any official of the Government to expend on his certificate and account to no one. We are reposing a great deal of confidence in you.

General Donovan: I feel that responsibility very keenly, Mr. Chairman.

The Chairman: And apparently the confidence is not being misplaced in any respect. Of course, we all realize that what you are doing is extremely important and should be surrounded with great secrecy. What precautions are you taking to preserve secrecy in that respect?

(Discussion off the record.)

The Chairman: In other words, you have someone supervising those procedures; you do not just turn over all this money without some supervision.

General Donovan: No, sir. The procedures are supervised by most responsible personnel.

Record, page 349.

COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25, D. C.

March 12, 1948

B-74185

The Director,
Bureau of the Budget.

My dear Mr. Webb:

Reference is made to your letter dated March 3, 1948, forwarding for my comments, a draft of a proposed bill submitted by the Central Intelligence Agency, entitled "A BILL To provide for the administration of the Central Intelligence Agency, established pursuant to Section 102, National Security Act of 1947, and for other purposes."

Section 102 of the National Security Act of 1947, Public Law 253, approved July 26, 1947, 61 Stat. 497, established the Central Intelligence Agency under the National Security Council, to coordinate the intelligence activities of the Government agencies in the interests of national security. The Central Intelligence Agency was charged with the duty, under the direction of the National Security Council to advise the Council in matters concerning the intelligence activities of the Government agencies as related to national security, to make recommendations to the Council for the coordination of such activities, to correlate, evaluate, and provide for the proper dissemination within the Government of such intelligence, and to be responsible for protecting the intelligence sources and methods from unauthorized disclosure. It was further charged with the performance, for the benefit of existing intelligence agencies, of such additional services of common concern as the National Security Council determined could more efficiently be accomplished centrally and such other functions and duties related to intelligence affecting the national security as the National Security Council might direct. Provision was made to the extent recommended by the National Security Council, and approved by the President, for intelligence relating to national security possessed by the various Government agencies to be made available to the Central Intelligence Agency for correlation, evaluation and appropriate dissemination and the personnel, property of and funds available to the Central Intelligence Group established pursuant to Executive Order (11 Fed. Reg. 1337) were transferred to the Central Intelligence Agency.

The proposed bill would define the authority of the Agency and establish certain procedures for its administration. Sections 1 and 2 of the bill define the terms used therein and provide for a seal of office for the Agency. Section 3 would grant to the Agency certain of the authorities granted the Departments of the Army, Navy, Air Force, the Coast Guard, and the Advisory Committee for Aeronautics by Public Law 413, approved February 19, 1948, in the procurement of supplies and services, such as authority to purchase the said supplies and services without advertising, where the aggregate amount involved is less than $1,000; where the public exigencies will not permit of delay incident to advertising; where direct procurement without advertising is deemed to be necessary in the public interest during periods of national emergency, declared by the Congress or the President; or where the supplies and services are to be procured and used outside the United States. The provisions as to advance payments under negotiated contracts, release of liquidated damages, etc., under sections 3, 4, 5, 6 and 10 of the Armed Forces Procurement Act would also be applicable to the Central Intelligence Agency. Sections 4 and 5 of the proposed draft relate to education and training of its officers and employees and allowance for travel and related items. Section 6 of the act would grant authority to the Central Intelligence Agency in performing its functions, to transfer to and receive from other agencies, funds authorized by the Director of the Bureau of the Budget, without regard to any of the provisions of law and permit the expenditure of funds thus received without regard to the limitations of appropriations from which transferred; would permit the exchange of funds; provide for the assignment or detail of officers of other agencies for duty with the Central Intelligence Agency, on a reimbursable basis; authorize couriers carrying confidential documents to carry fire arms; authorize, on certification of the Director that the action is necessary to the successful performance of its functions, the alteration, improvement, and repair of leased premises without regard to existing limitations; permit the employment of retired personnel of the armed services to be paid either their retired pay or pay as an employee of the Agency; except the Agency from complying with laws relating to publication or disclosure of the identity of its personnel for publication in the Federal Register; from furnishing reports of the number of its employees to the Bureau of the Budget, and from the necessity of allocating its positions as provided in 5 U.S.C. 654, 947b and 664; permits the entry into the United States of not to exceed 50 aliens and their immediate families in any calendar year, without regard to the immigration law, on the Director's determining that their entry is in the interest of national security or essential to the furtherance of national intelligence. Section 7 provides that funds made available to the Agency may be expended for numerous purposes specifically set forth therein; and with the approval of the National Security Council that portions of such funds may be expended without regard to the provisions of law applicable to Government funds or to the

employment of persons in the Government services and further, that with such approval objects of a confidential, extraordinary or emergency nature might be accounted for on certificate of the Director, such certificate to be deemed a sufficient voucher for the amount certified. Sections 8 and 9 provide for separability of provisions, in the event any provision is held invalid, and for a short title for the act.

While sections 3, 6, and 7 of the proposed enactment provide for the granting of much wider authority than I would ordinarily recommend for Government agencies generally, the purposes sought to be obtained by the establishment of the Central Intelligence Agency are believed to be of such paramount importance as to justify the extraordinary measures proposed therein. The importance of obtaining, correlating, and disseminating to proper agencies of the Government intelligence relating to national security under present international conditions cannot be overlooked. In an atomic age, where the act of an unfriendly power might, in a few short hours, destroy, or seriously damage the security, if not the existence of the nation itself, it becomes of vital importance to secure, in every practicable way, intelligence affecting its security. The necessity for secrecy in such matters is apparent and the Congress apparently recognized this fully in that it provided in section 102(d) 3 of Public Law 253, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. Under these conditions, I do not feel called upon to object to the proposals advanced in sections 3, 6 and 7 of the act. Sections 1, 2, 8 and 9 of the act are largely ministerial and free from objection under the circumstances. Sections 4 and 5 are patterned closely to the provisions of the Foreign Service Act of 1946, 60 Stat. 999, and appear free from objection except insofar as relates to the ordering to the United States, on statutory leave, citizen officers and employees of the Agency upon completion of two years' service abroad and the payment of expenses connected therewith. Unlike foreign service officers, no statutory provisions as to leave other than those applicable generally to Government employees as set forth in 5 U.S.C. 30, 30a, and 30b have been enacted as to officers or employees of the Central Intelligence Agency, and in order to avoid unnecessary expense in returning to the United States, employees who may be totally without accrued leave or whose stay here would be so brief as not to warrant the expense involved, it might be well to change section 5(a) 2 to read somewhat as follows:

"Order to continental United States on leave provided for in 5 U.S.C. 30, 30a, 30b, or as such sections may hereafter be amended every officer and employee of the Agency who is a citizen of the United States, upon completion of two years' continuous service abroad, or as soon as possible thereafter, provided that such officer

or employee has accrued to his credit at the time of such order, annual leave sufficient to carry him in a pay status while in the United States for at least 30 days."

The enclosures of your letter are returned herewith.

Respectfully,

(Signed) Lindsay C. Warren

Comptroller General
of the United States.

Enclosures.

Extracts from

DEBATE IN THE HOUSE OF REPRESENTATIVES
ON H.R. 2663, P.L. 110, THE CIA ACT OF 1949
81st Congress, 1st Session

Mr. Sasscer: "...Secondly, it should be pointed out that the Central Intelligence Agency functions exclusively under the powers granted to it by the National Security Act of 1947 and not under any Executive order whatsoever."

"Thirdly, with one or two exceptions to which your attention will be drawn, there is no authority in this proposed bill which at some time or other has not been granted to some other agency of the Government or which some other agencies are not now utilizing through their own implementing legislation."

"This bill which we are considering with one difference was introduced into the second session of the Eightieth Congress last year, and was unanimously approved by the Armed Services Committees both in the Senate and the House after detailed hearings."

"Within the framework of existing government laws and salaries, we are seeking to place CIA on a career basis, particularly for those of its employees who may spend a large portion of their career on foreign assignment...Finally, we are supplying the Agency with appropriation language to which their budget and fiscal employees, as well as those of the General Accounting office, may look in the auditing of the Agency's expenses."

"In broad terms, therefore, H.R. 2663 seeks to . . . free the Agency from certain restrictions so that it may operate as a mature intelligence service must operate." 95 Cong. Rec. 1944.

Mr. Sasscer: "...Finally we have provided in this bill some basic appropriations language to which the Government Accounting Office and the budget and fiscal offices of the Agency can look in the expenditure of funds. Much of this language is necessary, for without it the expenditure of funds for the purposes set forth herein cannot be allowed. In addition, we have provided the legal basis for the granting to this Agency authority for the spending of those unvouchered funds which the Appropriations Committee of the House will earmark, and without which there can be no successful operation of an intelligence service." 95 Cong. Rec. 1945.

Mr. Celler: "...Certainly if the members of the Armed Forces Committee can hear the detailed information to support this bill, why cannot our entire membership?" 92 Cong. Rec. 1945.

(Mr. Celler voted in favor of H.R. 2663 but not until after first expressing a desire for "background.")

Mr. Marcantonio, perhaps not unexpectedly, made several critical remarks on the general subject of secret legislation and displayed considerable concern at the notation in both the House and Senate Committee reports to the effect that full and detailed disclosure of the background behind all provisions could not be made for security reasons.

Mr. Marcantonio: "...Then, from the standpoint of Government operation, on page 15 of the bill, we find this:

> The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds.

I wish some of you gentlemen who have been cutting down appropriations for unemployment services and social welfare legislation would listen to this." 95 Cong. Rec. 1946.

Mr. Short: "I want to call the attention of the members of the House to a sentence from Rear Admiral Hillenkoetters' request which he made in a letter to the Speaker of the House, found on pages 6 and 7 of the report.

In the next to the last paragraph he states:

> 'In almost all instances, the powers and authorities contained in the bill already exist for some other branch of the Government, and the bill merely extends similar authorities to the Central Intelligence Agency.'
>
> That is absolutely true." 95 Cong. Rec. 1947.

HISTORICAL SUMMARY OF OCCASIONS IN THE POLITICAL HISTORY OF THE UNITED STATES ON WHICH THE LEGISLATIVE HAS SOUGHT TO COMPEL THE EXECUTIVE TO PRODUCE CONFIDENTIAL DOCUMENTS

In March of 1792, the House of Representatives passed the following resolution:

> "Resolved, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries." 3 Annals of Congress, p. 493.

The expedition of General St. Clair had been under the direction of the Secretary of War and the assertion of the House of Representatives of its rights to investigate was predicated upon its control of the expenditure of public monies. The Secretaries of War and Treasury apparently appeared in person before the committee. However, when President Washington himself was asked for the papers pertaining to the General St. Clair campaign, a cabinet meeting was called at which it was unanimously concluded that the President should communicate only such papers as the public good would permit and should refuse disclosure of those which would injure the public. All but Secretary of the Treasury Alexander Hamilton believed this doctrine applied as well to Heads of Departments who come under the President.

In 1796, President Washington was presented with a House resolution requesting that the House be shown a copy of the instructions to the U.S. Minister who negotiated the peace treaty with Great Britain together with related documents and correspondence. The House was insisting upon examination of these papers as a condition precedent to appropriating funds to implement the treaty.

Washington addressed a message to the House in which he discussed the requisites of secrecy in international intercourse and expressed the feeling that admission of the House of Representatives into the treaty making process would create dangerous precedence. He concluded the address by a categoric refusal to divulge the information requested.

In January 1807, during Jefferson's administration, Representative Randolph introduced the following resolution:

> "Resolved, That, the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any

illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same." 16 Annals of Congress (1806-1807), p. 336.

This resolution was overwhelmingly passed at a time when the Burr conspiracy was stirring the country. Jefferson's message to the Senate and House provided a summary of recent events and then with respect to the accumulation of data in his hands stated: "...In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question." Richardson, Messages and Papers of the Presidents, Vol. I, p. 412, dated January 22, 1807.

On three different occasions President Andrew Jackson successfully resisted attempts by the House and Senate to extract information and papers of the Executive considered to be confidential. The first of these was a request for a copy of a paper which had been published and allegedly read by the Executive to the Heads of the Departments. The second was a request for information in connection with the investigation by the Senate respecting frauds in the sale of public lands. The third was a request in connection with a House resolution to investigate the condition of the Executive Department concerning their integrity and efficiency.

In 1842 during John Tyler's administration, the principle was established that all papers and documents relating to applications for office are of a confidential nature, and an appeal to a President to make such records public should be refused. Tyler abjectly denied a request to communicate to the House the names of such members of the 26th and 27th Congresses as had applied for office, and for what offices, and whether in person or by writing or through friends.

President Tyler was successful on a later occasion in withholding confidential information from the House in connection with an inquiry into reports relative to the affairs of the Cherokee Indians and frauds alleged to have been practiced upon them. In a message to the House dated January 31, 1843, he stated:

"...The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed' necessarily confers an authority, commensurate with the obligation imposed, to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective, these inquiries must often be confidential. They may result in the collection of truth or of

falsehood; or they may be incomplete, and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated, or in respect to the character of the information obtained, would deprive him at one of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage, and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive." Hinds, Precedents of the House of Representatives, Volumn 3, p. 181 (1907).

A few years later during James K. Polk's administration a resolution of the House of Representatives requested the President to furnish the House an account of all payments made on the President's certificates, with copies of all memoranda regarding evidence of such payments, through the agency of the State Department, for the contingent expenses of foreign intercourse from March 4, 1841, until the retirement of Daniel Webster from the Department of State. In 1841, John Tyler was President with Webster his Secretary of State. The request, therefore, was for the details of certain payments made by the State Department during the preceding administration.

Polk replied to the request:

"An important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to public view that which he had determined should not be 'made public.' If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not." Richardson, Messages and Papers of the Presidents, Vol. IV, p. 433.

This action illustrates the principle that what a past President has done, whether or not by law he was entitled to keep it confidential, a subsequent President will not reveal. President Polk felt obliged to maintain secrecy because of the dangers of precedence despite strong public feeling then existing against secrecy of any kind in the administration of the government, especially in matters of public expenditures. Polk was able to point to a law that had enabled his predecessors in office, in the public interest, to keep expenditures of a certain kind secret in nature. Congress, of course, could have repealed the law had it chosen to do so.

President James Buchanan on March 28, 1860 was compelled to protest an attempt by the House of Representatives to investigate whether any means of influence had been brought to bear upon the Congress for or against the passage of any law relating to the rights of any state or territory.

In April 1876, President Grant fought a hostile House inquiry into the discharge of his purely Executive office acts and duties. Grant recognized the constitutional authority given the House of Representatives to require of the Executive information necessary for legislation or impeachment. The inquiry involved was not for legislative purposes, and if for impeachment, Grant objected that it was an attempt to deny him the basic right not to be a witness against himself. It became evident that the House request was a political move to embarrass the President by reason of his having spent some hot months at Long Branch.

During the first administration of Grover Cleveland the great debate on "Relations Between the Senate and Executive Departments" took place. The debate arose out of Cleveland's dismissal from office of approximately 650 persons in the Executive branch. Cleveland disclaimed any intent to withhold official papers, but he denied that papers and documents inherently private or confidential, addressed to the President or a Head of a Department, having reference to an act entirely Executive, were changed in their nature and became official when placed for convenience in custody of public departments. Concerning such papers the President felt that he could with entire propriety destroy them or take them into his own personal custody. Cleveland won his victory. His action established a precedent for setting apart for the first time private papers in the Executive Departments from public documents. The President was the one who established the character of the papers.

President Theodore Roosevelt proved successful in his resistance to a Senate resolution calling for the production of all documents in connection with federal anti-trust actions. Roosevelt refused to disclose the reasons why particular actions had not been taken. The Senate was equally thwarted in its attempt to get its information from two heads of departments. Subsequently there was introduced the following resolution in the Senate.

"Resolved by the Senate, That any and every public document, paper, or record, or copy thereof, on the files of any department of the Government relating to any subject whatever over which Congress has any grant of power, jurisdiction, or control, under the Constitution, and any information relative thereto within the possession of the offices of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdiction." 43 Cong. Rec. 839 (1909).

Out of the lively debate that ensued the following points seem to be established:

1. That there was no law which compelled heads of departments to give information and papers to Congress.

2. That if a head of a department refused to obey a subpoena of either of the Houses of Congress, there was no effective punishment which Congress could mete out.

The resolution never came to a vote.

President Coolidge in 1924 was compelled to thwart a Senatorial attempt to vent a personal grievance on the Secretary of the Treasury by ostensibly obtaining information from him upon which to recommend reforms in the law and in the administration of the Internal Revenue. Mr. Coolidge in a special message to the Senate dated April 11, 1924 stated it was recognized both by law and custom that there was certain confidential information which it would be detrimental to the public service to reveal.

In June of 1930 the Senate Foreign Relations Committee sought from the Secretary of State confidential telegrams and letters leading up to the London conference and treaty. Secretary Stimson provided such information as he could which evidently fell short of satisfying the committee. A resolution of the committee to the effect that it regarded all facts which entered into the antecedent and negotiations of any treaty as relevant and pertinent when question of ratification was involved. A message from President Hoover to the Senate on July 11, 1930 culminated this lengthy bitter debate. In this he pointed out the number of informal statements and reports given our government in confidence. To publish such statements and reports would be a breach of trust of which the Executive should not be guilty. The debate wound up in the adoption of a face-saving resolution by Senator Morris.

The administration of Franklin D. Roosevelt affords numerous instances of legislative attempts to obtain confidential executive papers. The first of these occurred in May of 1935. The President successfully avoided a precedent of sending to the Congress the text of remarks made at a bi-weekly press conference.

In 1941 the House Committee on Naval Affairs requested the FBI to furnish the reports made since 1939 together with correspondence, in connection with investigation arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts. The Attorney General Robert F. Jackson denied the request. Portions of his published opinions are discussed at Section IV, pages 17 and 18 of this study.

On January 20, 1944 at the Hearing before the Select Committee to Investigate the FCC, the Director of the Federal Bureau of Investigation called upon to testify, was sustained by the Committee Chairman in his claim of privilege not to testify as to certain matters on which the President had directed him to remain silent. The Chairman suggested to the Committee Counsel that he interrogate Mr. Hoover on other matters. As to these, Mr. Hoover still refused to testify; the Chairman then pointedly ordered Mr. Hoover to answer questions put to him by the Counsel. Again Mr. Hoover obdurately refused. The record of the hearings is silent as to any action taken by the committee following Mr. Hoover's refusal.

This same special Committee on another occasion sought the production of records and testimony from the various Heads of Departments and Directors of Agencies. On each occasion the President or his cabinet members or Heads of Departments exercised their own discretion concerning the propriety of furnishing testimony and papers. Where there was refusal, the Committee thought it wise not to press the issue.

In the autumn of 1945 when the tragedy of Pearl Harbor was the object of legislative scrutiny the Joint Congressional Committee attempted to elicit from subpoenaed witnesses information regarding the Cryptanalytic Unit. The President did everything possible to assist the investigation recognizing the public desire for full and complete disclosure. A minority of the committee believed that the President was imposing restraints on those whom he allowed to appear. To an extent this was true because the President quite evidently assumed responsibility of guiding and directing the Heads of the Departments concerning the oral testimony and written material which they were to furnish the Committee. In so doing, Mr. Truman was exercising historically precedented executive prerogative.

As recently as 1948 the Joint Committee on Reduction of Non-essential Federal Expenditures, chairmaned by Senator Harry F. Byrd, sought reports of personnel strength from this Agency. As politely as possible, full disclosure was refused because of the risk of publication and dissemination beyond the Committee. A peaceable compromise was effected whereby the Committee Chairman was appraised of the information desired and the disastrous effects of publication were avoided.

In the same year the House of Representatives passed House Joint Resolution 342 directing all executive departments and agencies of the Federal Government to make available to any and all committees of the House of Representatives, and the Senate, any information which might be deemed necessary to enable them to properly perform the duties delegated to them by the Congress. Quite fortunately, this resolution never came to a vote in the Senate.

Extract from

LETTER OF COMPTROLLER GENERAL TO THE DIRECTOR,
CENTRAL INTELLIGENCE AGENCY, NOVEMBER 21, 1951

However, notwithstanding established law with reference to retroactive increases, you urge that you are authorized to pay such increases to the Agency's employees by resort to the power conferred by section 10 of the Central Intelligence Agency Act of 1949, 63 Stat. 212, which reads in part, as follows:

Section 10.

(a) Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions, including--

(1) personal services, including personal services without regard to limitations on types of persons to be employed * * *

(2) supplies, equipment, and personnel and contractual services otherwise authorized by law and regulations, when approved by the Director.

(b) The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds * * *

The extraordinary powers granted to the Central Intelligence Agency by section 10 and other sections of the 1949 act--and this I am sure you will agree--result solely from the congressional recognition of the extraordinary functions assigned that Agency by the act.

This Office recognized that fact when the bill which became the Central Intelligence Agency Act of 1949 was pending before the Congress and for that reason did not object to the grant of what must be conceded as unusual authority. But I feel certain it was not contemplated by the sponsors of the bill or by the Congress that this broad authority would be resorted to, or that it even contemplated a disregard of any control with respect to the normal administrative or operating problems which confront the ordinary Government agency. On the contrary the act itself specifically and in considerable detail delineates the increased authority of your Agency in those matters. To adopt the view suggested in your letter would be equivalent to concluding that your Agency is authorized to grant retroactive increases, bonuses, or other perquisites to any or all of

its employees with such frequency, or at such times, as desired, contingent only on the availability of funds. I cannot attribute any such intention to the Congress.

Volume 31, Decisions of the Comptroller General, (B-106516), p. 192-193.

Extracts from Statements
Made During Hearings Before
The Special Committee on Atomic Energy
United States Senate
Seventy-Ninth Congress
Second Session
on
S. 1717
A Bill for the Development and Control
of Atomic Energy
by
Lindsay C. Warren, Comptroller General of the United States
and
Major General Leslie R. Groves

Mr. Warren: It is not necessary for me to remind you that the General Accounting Office as well as the Comptroller General is an agent of the Congress. We are entirely disassociated from the executive branch of the Government, and that view was reaffirmed by the Congress with passage of the recent reorganization bill which provided that the Comptroller General of the United States and the General Accounting Office are a part of the legislative branch of the Government. Therefore, except for the friendly interest of Members of Congress who believe in responsible fiscal accountability, naturally we would have no way in the General Accounting Office to know of provisions such as this. The General Accounting Office in my opinion is the last great bulwark in this Nation for the protection of the taxpayers against unbridled and illegal expenditures of appropriated funds, and it is therefore peculiarly the office of the Congress.

I am unalterably opposed to the provisions carried in subsection 10 on page 39. An analysis of it will show you and will convince you that it is a mockery and a fraud, and if it should become a law in this form--and I have been called upon many times in the past to express myself on it--in all candor, I would have to use these same expressions. It is utterly meaningless and would constitute an unwarranted waste of appropriated money.

The Chairman: Which sections are your talking about?

Mr. Warren: I am talking about subsection 10 on page 39.

The Chairman: You mean the whole section? I understood you to say the latter part of it.

Mr. Warren: Well, you would have to consider the section as a whole.

In the first place, it says that this Commission may--

> (10) determine its own system of administrative accounts and the forms and contents of its contracts and other business documents.

Senator Byrd: Mr. Warren, could I ask you a question there?

It was stated to the committee yesterday by one of the associates of the committee that these provisions have been agreed to by the assistant general counsel of the Comptroller General's Office. Is that correct?

Mr. Warren: Senator, that is absolutely incorrect. He is here today. Mr. Fisher is acting general counsel. Mr. Ellis is one of my administrative assistants. They are two of the ablest men that we have in the General Accounting Office. They have my full confidence, and they tell me that never, directly or indirectly, did they agree to any such provision as this, which is contrary to the entire policy of our Office.

One of the primary purposes of the General Accounting Office is to establish the accounts and forms. We do that for every agency of this Government, and this question is therefore pertinent: Why should it not be done in this case? What is there in this that would call for this Commission to set up its own accounting system and its own forms?

It says here:

> The Comptroller General shall audit the transactions of the Commission and within 6 months after receipt of each voucher shall file a report with the Commission with respect to each accountable officer showing each action to which exception is taken pending further information and each action which after full examination would have been disallowed except for the provisions of this paragraph.

If that were required, it could be done without this language if we had anything to do with the audit of it.

> The expense of such audit shall be paid from appropriations for the General Accounting Office and in conducting such audit, the Comptroller General may use personnel of his own selection and shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property, and places belonging to or under the control of or used or employed by the Commission * * *

We have all that authority anyway. Thay doesn't mean a thing, unless you want to restrict certain information from us by excepting access to the information restricted.

The Chairman: That is the purport of the language, isn't it, Mr. Warren?

Mr. Warren: Well, I don't so construe it there, unless that is the sole reason for it. But I will get to the restriction in just a minute. (Reading:)

> and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries * * *

We would have that right under existing law.

Senator Millikin: You missed some significant words there:

> except where access to information restricted under section 10 would be involved * * *

Mr. Warren: I mentioned that. (Continuing to read:)

> but, notwithstanding the provisions of any law governing the expenditure of public funds, the General Accounting Office in the settlement of the accounts of the Commission or any accountable officer or employee of the Commission, shall not disallow credit for, or withhold funds because of, any expenditure which the Commission shall determine and certify to have been necessary to carry out the provisions of this act.

Of course, gentlemen, that is the joker. They could do anything on the face of the earth, practically, and the Commission would then decide it was all right. You provide for an audit all the way down, and at the very end you say that regardless of what you found in the audit, the Commission can upset everything that you have done.

Hearings, pp. 497-499

Mr. Warren: I may surprise the committee when I tell you that we were in on the atomic secret from the very beginning. There were confidential conferences between the Under Secretary of War, at that time Judge Patterson, and General Groves, the Assistant Comptroller General, and myself. We have audited or are auditing every single penny expended on this project, and that was in wartime. We had our men passed on by the FBI within the enclosures and compounds of these two projects. We audited on the spot and kept it current, and I might say it has been a remarkably clean expenditure.

I have had no conversation with General Groves in several months. I will say, however, that he has personally thanked me and other officials of the General Accounting Office several times for our fine cooperation, and I understand that in a public speech here in Washington, before a group of scientists, he expressed high commendation of the work of the General Accounting Office.

We gave one quick favorable decision on a matter that was presented on this project, but the very fact, gentlemen, that our men were there where the agents of the Government could consult with them time after time assured, in my opinion, a proper accountability.

I would suggest if you have any doubt as to this cooperation that you might ask General Groves, because I will say this for him: From the very beginning he has insisted upon a full audit and a full accountability to the General Accounting Office.

Now, if that went on in war, if we passed upon $2,000,000,000 of these expenditures in war, I cannot see the argument as to why they should not be audited in peace.

Hearings, p.500

Mr. Warren: I would think so, without looking it over now. They asked me if I would propose some other language, and I proposed the following:

> Notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office in the settlement of the accounts pertaining to the operations of the Commission may allow credit for any expenditure shown to have been necessary to carry out the provisions of this Act.

Now, that leaves the law just as it is, but puts the discretion in the Comptroller General rather than in the Commission, because then Congress has a target to shoot at if there is anything wrong. You would never find anything, you would never hear anything, about the Commission handling these. But if I should do anything wrong, then I am subject to removal or impeachment, and you have got it centered in one person--not that I want that authority. Instead of leaving that discretion in the Commission, under this language you would leave it in me.

I understand that the House committee tentatively adopted this. Now, I was further informed--subject, of course, to being corrected--upon high authority in the House committee that the War Department itself suggested that all reference to the General Accounting Office be completely eliminated from the bill, and that is the way it

stands now over there, which, of course, leaves us to audit just as we did during the war.

The Chairman: Well, that certainly is an interesting situation. I was informed that the committee that drew the original May-Johnson bill gave great consideration to that. In fact, that is what first started me thinking about this, because when the bill was originally introduced we did not have a section pertaining to the General Accounting Office, and on a comparison with the May-Johnson bill I saw that that was there and did a little investigating. It seems to be a very strong point with those who drew the May-Johnson bill that they wanted this language in there.

Now, of course, you have tentatively offered this suggestion to put the discretion in the Comptroller General instead of in the Commission. That is an interesting suggestion, Mr. Warren, but I frankly cannot see how the Government's interests would be better protected by having the discretion in the reviewing officers rather than in the people that must actually do the day-to-day operation, because they are removable by impeachment, too, for malfeasance in office.

We have, I might say further, a joint congressional committee provided for in this bill which, under the terms of the act, is to keep in very close touch with the Commission, and I imagine that committee will be doing a little reviewing on its own account.

Senator Byrd: They wouldn't do any auditing, would they?

The Chairman: As far as the Commission is concerned, Senator.

Mr. Warren: I didn't want that myself. That was drawn at the suggestion of some members of the House committee. I think that is all right, but personally I do not want it.

The distinction is this, Senator: The difference lies between an examination by those who spend the money and one by an independent agency looking over it which is not responsible under the executive branch of the Government but is responsible to the Congress itself.

Hearings, pp. 502-503.

Mr. Warren: Now, I am not using extreme language, and I merely ask you to believe me when I say this from experience. The language in subsection 10 is an absolute fraud and a joke and means nothing whatever.

The Chairman: The only correction that I would make of you, Mr. Warren--and I did not write that subsection--when you denominate

it as a fraud is that that has the connotation of intent to deceive. Now, I think you would agree with me that it would be a bold spirit indeed that would write language that is so obviously fraudulent as you denominate this to be, with the hope that it might get through 535 Members of Congress.

Mr. Warren: Senator, I have seen language like this submitted.

The Chairman: You take out the intent to deceive?

Mr. Warren: Well, you know what I am talking about, but I have seen language like this proposed time after time, and it is proposed deliberately. I don't know of any other way except to say that it is proposed to deceive. I don't know of any other way to express it. It is to break down these controls.

Now, the whole position of the Congress in the last year has been to draw back and to vote back controls where they have been let down to see that they are now safeguarded in accounting. That was done in the Butler-Byrd bill.

Hearings, p. 504.

Senator Byrd: That is the complete power that was covered by the Byrd-Butler-Whittington bill, so this would be the first department of all the agencies of the Government, as the laws now exist, that would not be subject to the kind of audit you think it is necessary to make?

Mr. Warren: That is correct.

Senator Byrd: Now, you have the same power to withhold an appropriation from the War Department?

Mr. Warren: That is correct.

Senator Byrd: You have it from the Navy; you have it from every branch of the Government, and I am unable to see why any injury to the service of the Government would occur by extending the power to this operation.

Mr. Warren: Senator, that is a specious argument advanced by those who are opposed to any audit. It is nothing new with us. We hear the same argument. We heard it on the corporations, as you well know.

Hearings, p. 505

The Chairman: Mr. Warren I would like to ask you a couple of questions. You denominated this language as, if at least not intended to be fraudulent, fraudulent on its face. Let me ask you this.

Mr. Warren: Perhaps I should say, Senator, that it creates the impression that it is effective, and it is deceptive because it is not effective.

The Chairman: Well, let us find out the limit of its effectiveness. It is effective in permitting you to go with your auditors and accountants to examine every single account and every single transaction that this Commission makes.

It is effective in the sense that it permits you to report on what you find to the Congress.

Mr. Warren: Well, it doesn't even say that. I would hold, however, I could report.

The Chairman: You said you had a right to do that?

Mr. Warren: Yes.

The Chairman: Now, it is effective then in those two respects. Where it is not effective, in your opinion, is that it does not permit you to (a) disallow certain expenditures as having been made not in accordance with the law, and (b) to withhold funds pending the restoration of the disallowance by the disbursing agent to the Treasury of the United States. Those are the two ineffectives.

Mr. Warren: Well, the last thing that you mentioned is one of the last resorts of the Comptroller General and in fact is his real power.

Of course, the withholding power primarily is intended for cases of failure to account, not for mere disallowances. There has been no occasion to ever exercise that since I have been Comptroller General.

The Chairman: I just wanted to get the problem set out in the four corners of it, in view of the strong language that you did use, that those are the two things which you think are essential; namely, (a) the power to disallow and call upon the disbursing clerk, call him what you will, of the organization to restore some money to the Treasury and (b) to withhold funds. Those are the two powers; am I right?

Mr. Yates: Yes, Senator. But there is a third that is not so tangible.

The Chairman: What is it?

Mr. Yates: It is the effective result of the audit by the General Accounting Office which flows from the knowledge on the part of the spending officers that the General Accounting Office can disallow credit or withhold funds.

Now, if you will write in the law that the very spending agency, the Commission itself, can by a stroke of the pen remove any disallowance of credit or withholding of funds, then all responsible officers for funds know that the Commission under which they are operating can save their own skins, and your effective deterrent is gone.

The Chairman: I am very glad to have those three things set out.

Hearings, pp. 514-515

General Groves: . . . Now, I think, in the appropriations, there should be some provision for certain expenditures, such as now exists, I believe, with respect to the FBI. I am not familiar with the FBI appropriations, whether they can certify, but I think there may be, depending on the bill, which I have not seen in its present form, the necessity for some such appropriations in a limited sum, but I cannot see anything that should remove from the Comptroller General the power of audit.

I think it would be a mistake to do it.

Hearings, p. 527

The Chairman: I would like to ask Mr. Warren what the provision is that General Groves is talking about in the FBI.

Mr. Fisher: They have a right to make a certification without disclosing what the money is spent for.

Mr. Yates: That only goes to a limited part of the appropriation. It is something like the fund which the Congress has provided in the appropriation for the War Department. A certain limited amount of money may be expended for unforeseen emergencies upon certification.

The Chairman: How much is that in the case of the War Department?

Mr. Yates: I cannot tell you that exactly, Mr. Chairman, but it is a very small amount compared to the total appropriation.

The Chairman: There is no provision for that, of course, in here?

Mr. Fisher: No.

The Chairman: Now, should there be anything in here to carry out General Groves' idea on that?

Mr. Yates: It wouldn't be necessary, Mr. Chairman, because it could be done, as General Groves is suggesting, and has been done in like situations before, by the Appropriations Committee.

The general bill that you have here authorizes the necessary appropriations. Now, if the Appropriations Committees wish to provide that a certain part of that appropriation which they may make pursuant to the authorization may be expended upon certification for emergency purposes, that in the past has been regarded as within the province of the Appropriations Committees.

The Chairman: That could not be raised as a question of legislation in the appropriations bill?

Mr. Yates: I would not think so.

Hearings, pp. 527-528

The Chairman: Mr. Warren, how about the State Department? Do they have any procedure whereby they spend money on a blanket authorization?

Mr. Fisher: Yes.

The Chairman: That is the same nature as the FBI?

Mr. Fisher: Generally, the same purpose, just not to disclose the purpose for which the money was spent, and make certification that it was spent for confidential purposes, which it is not in the public interest to disclose.

The Chairman: Now, that has no legislative authorization? It is simply before the Appropriations Committee?

Mr. Fisher: It is in the statutes of the State Department.

The Chairman: Would there be any objection, from the Comptroller General's standpoint, to putting it in here? Do you think we will need it?

Mr. Yates: I don't think you do, Mr. Chairman.

Mr. Warren: I don't think you need it, although we are not opposing that.

The Chairman: Why, if they need it, would this Commission not need it, or do they need it themselves?

Mr. Warren: Well, they probably do, dealing with world affairs as they do and highly confidential matters between nations. Probably they do need it.

The Chairman: Of course, there would be some highly confidential operations in this Commission, I presume.

Mr. Yates: I thought your question was whether the authorization is needed or not.

The Chairman: Well, since it is written into the Revised Statutes applying to the State Department, I questioned whether, unless we wrote it into this bill, the Appropriations Committee could make that kind of appropriation. Frankly, I don't know. The very fact that it appears in the Revised Statutes of the State Department, which apparently thought it was necessary, leads me to believe that maybe it should be in here.

Mr. Warren: You have reference to a point of order?

The Chairman: Yes.

Mr. Warren: I don't think it is subject to a point of order.

Senator Vandenberg: I see no objection to putting it in the statute, do you Mr. Warren?

Mr. Warren: No; I do not, Senator.

Senator Vandenberg: Well, let's put it in.

Hearings, p. 530-531

Extract from

TWENTY-FOURTH INTERMEDIATE REPORT

of the

COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS

At the time the engineers, in behalf of the armed services, had charge of the Los Alamos project, there was a fund designated as "confidential funds" for use in counterespionage work. A certain amount of this fund was used by the predecessor of the present manager for entertainment purposes. This was an improper and ill-advised use of the fund. When the Atomic Energy Commission took over from the Manhattan District, there likewise was provided a confidential fund for counterespionage work and a certain amount of that fund was used for entertainment purposes.

After certain sums had been used improperly, it was brought to the attention of the manager that this was an improper use of the fund and the expenditures for entertainment purposes ceased.

Responsibility for improper use of these funds is not fixed by the subcommittee. The subcommittee recognizes that the manager in his capacity has many distinguished visitors and some entertainment must be provided. The subcommittee feels, however, that an entertainment fund should be specifically provided by the Appropriations Committee of the Congress, for that purpose and eliminate the necessity of illegally using other funds.

House Report No. 2478, 80th Congress, 2nd Session, p.5

Extract From

APPLICATION OF PUBLIC MONEY REPORT
(Nicholson), 1802

To House of Representatives, April 29, 1802

The Committee beg leave, likewise, to refer to an important principle formerly settled by the Executive, and actually practised upon in the War Department, in relation to the expenditure of public money, which they deem improper, in a Government like ours, where taxes cannot be imposed but by public consent, and where moneys arising from those taxes, cannot be disbursed but upon the authority of a law previously passed by the Representatives of the nation. By an act, passed on the 9th of February, in the year 1793 (1 Stat. L., 299), the President is directed to cause the moneys drawn from the treasury, for the purpose of intercourse with foreign nations, to be settled, by causing the same to be accounted for, specifically, in all cases wherein the expenditure thereof may, in his judgment, be (753) made public; and by making a certificate or certificates, or causing the Secretary of State to make a certificate or certificates of the amount of such expenditure, as he may think it advisable not to specify; and such certificates are to be taken as sufficient vouchers for the sums expressed to have been expended. The policy of this law, the committee do not intend to question, but it is clear that it extends only to cases of compensation, for what are usually termed "secret services" that may be rendered to the United States in their intercourse with foreign nations. The section above recited has been engrafted into two laws, passed in the respective years of 1798 (Mar. 19, 1798, 1 Stat. L., 541) and 1800 (May 10, 1800, 2 Stat. L., 78), but in every law on the subject, it has been expressly confined to foreign intercourse, and in the act of 1800, is farther limited to the contingent expenses only of foreign intercourse. It has not, therefore, been without considerable surprise that the committee have seen the same principle applied to the expenditures of the War Department.

In the instructions given by the Secretary of War to the Accountant of the War Department, in his letter of the 28th of December, 1797, herewith reported and marked L, a rule is positively laid down, that expenditures for secret services, rendered in relation to the duties of the War Department, are to be admitted. And on the 20th day of December, in the year 1799, the Secretary of the Treasury made a report on this subject to the President of the United States, (subjoined and marked M) in which the principle is again recognized as applicable to the Departments of State, War, and Navy. On the subsequent day the President accordingly signed two certificates as vouchers for money said to have been expended

in relation to the duties of the War Department, which certificates are annexed to this report, and are marked N and O. The committee entertain no doubt as to the illegality of this measure, as it is authorized by no law whatsoever, and they had flattered themselves that the Federal Government required no services of any nature which ought to be concealed from the officers of the treasury, or from the Legislature. They consider these facts as coming properly under the head of expenditures not authorized by law.

Powell, CONTROL OF FEDERAL EXPENDITURES, (The Brookings Institution, 1939) pp. 205, 206.

Extract From

REPLY TO CHARGES IN NICHOLSON REPORT
ON APPLICATION OF PUBLIC MONEY

(Wolcott), 1802

The next subject relates to the application of money for purposes of a confidential nature, in the war and navy departments, upon which the Committee express their opinion in the following terms:

> "The Committee beg leave likewise to refer to an important principle formerly settled by the Executive, and actually practised upon, in the war department, in relation to the expenditure of public money, which they deem improper, in a government like ours, where taxes cannot be imposed but by public consent; and where monies, arising from those taxes, cannot be disbursed, but upon the authority of a law, previously passed by the Representatives of the nation. By an act passed on the 9th of February, in the year 1793, the President is directed to cause the monies drawn from the Treasury, for the purpose of intercourse with foreign nations, to be settled by causing the same to be accounted for specifically in all cases, wherein the expenditure thereof may, in his judgment, be made public; and by making a certificate, or certificates, or causing the Secretary of State to make a certificate or certificates, of the amount of such expenditures; as he may think it advisable not to specify; and such certificates are to be taken as sufficient vouchers, for the sums expressed to have been expended. The policy of this law, the Committee do not intend to question, but it is clear, that it extends only to cases of compensation, for what are usually called 'secret services' that may be rendered to the United States, in their intercourse with foreign nations. The section above recited, has been ingrafted into two Laws, passed in the respective years, 1798, and 1800, but in every Law on the subject, it has been expressly confined to foreign intercourse; and in the act of 1800, is farther limited to the contingent expenses only of foreign intercourse. It has not therefore been without considerable surprise, that the Committee have seen the same principle applied to the expenditures of the war department.
>
> In the instructions, given by the Secretary of War to the Accountant of the War Department, in his letter of the 28th of December, 1797, herewith reported and marked L, a rule is positively laid down, that expenditures for secret services, rendered in relation to the duties of the War Department, are to

be admitted. And on the 20th day of December, in the year 1799, the Secretary of the Treasury made a report on this subject, to the President of the United States, subjoined and marked M, in which the principle is again recognized, as applicable to the departments of State, War and the Navy. On the subsequent day, the President accordingly, signed two Certificates, as vouchers for monies, said to have been expended, in relation to the duties of the War Department, which certificates are annexed to this Report, and are marked N, and O. The Committee entertain no doubt, as to the legality of this measure, as it is authorized by no law whatsoever, and they had flattered themselves that the Federal Government required no services of any nature, which ought to be concealed from the officers of the Treasury, or from the Legislature. They consider these facts as coming properly under the head of expenditures, not authorized by law."

I do not possess a copy of the letter of the Secretary of War, but I recollect that the Accountant of the War Department, declined complying with a requisition of the Secretary of War, respecting an expenditure of a confidential nature; that a representation of the case was made to the President, who required my opinion in writing. The following is a copy of my report to the President.

"The Secretary of the Treasury, in obedience to the command of the President of the United States, has considered the letter of the Secretary of War, dated, November 29th, 1799, and thereupon most respectfully submits the following Report.

That by an act of Congress, passed on the 9th of February, 1793, it is declared 'That in all cases, where any sum, or sums of money, have been issued, or shall hereafter issue, from the Treasury, for the purpose of intercourse, or Treaty, with Foreign nations, in pursuance of any Law, the President shall be, and he is hereby authorized to cause the same to be duly settled with the Accounting officers of the Treasury, in manner following, that is to say, by causing the same to be duly accounted for, specifically in all instances wherein the expenditure thereof may in his judgment be made public; or by making a Certificate or Certificates, or causing the Secretary of State to make a Certificate, or Certificates of the amount of such expenditures as he may think it advisable not to specify, and every such Certificate, shall be deemed a sufficient voucher for the sum or sums therein expressed to have been expended.

The foregoing express provision by Law, contains, as is believed, a safe and proper rule, for controlling the expenditure of all monies disbursed for secret purposes: it is impossible to con-(41) duct the business of the Departments of State, War

and the Navy, without sometimes incurring expenses, the precise objects of which cannot be safely disclosed: It is however at the same time necessary, that such expenditures, should be made, in a manner best calculated to shield the officers of Government from odium, or suspicion.

To reconcile these objects in the best manner possible, and to preserve the means of ascertaining the aggregate amount of all secret disbursements, it is respectfully submitted as the opinion of the Secretary, that all such expenditures, ought to be ascertained to the satisfaction of the President, and certified according to the form hereto annexed."

"All which is respectfully submitted."

The following is a copy of the form referred to.

"By * * * * * *

President of the United States

It is hereby declared, that by the representation of the Secretary of the Department of it appears to my satisfaction, that dolls. cents, have been disbursed, for objects in relation to the duties of the said Department, and to promote the interests of the United States, the specification of which disbursements, at this time, is deemed inexpedient. This certificate is therefore granted to serve as a voucher, for the sum aforementioned, which is (here insert the words, 'to be paid,' or the words, 'to be passed to the credit of,' as also the name) by the proper officer, or officers, of the Government of the United States.

In witness whereof, I have signed these Presents, this day of and caused the same to be countersigned by the Secretary of the Department of and the Seal of the said Department to be hereto annexed."

It will be perceived, that it was merely the object of this Report to establish such a form for controlling expenditures of a confidential nature, as would most effectually prevent abuses, and "shield the Officers of Government, from odium, or suspicion." I never doubted for one instant, that such expenditures were lawful, and that the principle should now be questioned, has excited a degree of astonishment in my mind, at least equal to the "surprise" of the Committee.

It is then seriously asserted, that in the War and Navy Departments; establishments, which from their nature presuppose an actual,

or probable state of War; which are designed to protect our country against enemies, that the precise object of every expenditure must be published? Upon what principle are our Generals and Commanders, to be deprived of powers, which are sanctioned by universal usage, and expressly recognized as lawful, by all writers on the Law of Nations? If one of our naval Commanders, now in (42) the Mediterranean, should expend a few hundred dollars for intelligence, respecting the force of his enemy, or the measures meditated to him, ought the present Administration to disallow the charge, or publish the source, from which the intelligence was derived? Is it not equivalent to a publication, to leave in a public office of Accounts, a document explaining all circumstances relating to a payment?--Ought the truth to be concealed, by allowing fictitious accounts? Could a more effectual mode of preventing abuses be devised, than to establish it as a rule, that all confidential expenditures should be ascertained to the satisfaction of the Chief Magistrate of our country, that his express sanction should be obtained, and that the amount of all such expenditures, should be referred to a distinct account, in the public Records?

There exists no colorable excuse, for exciting the public jealousy on this subject; I am confident that the secret expenses of the War Department, since the establishment of the present government, do not exceed a few thousand, probably not more than five, or six thousand, dollars; The first expenditure, which I can recollect was made in 1790, or 1791, and from the nature of the object, as well as the usual mode of conducting such affairs, it is highly probable that it was known to all the then heads of Departments; information, that such expenditures were made, was given to Congress in 1792, as is proved by the following extract from a printed Report, in relation to an estimate for the contingent expenses, of the War Department.

> "It is to be observed upon this article, as well as every other in this estimate, that for every cent expended in pursuance thereof, vouchers must be produced at the Treasury, excepting perhaps the sums, which may be expended for secret intelligence, where the names might be important to be concealed; but for the propriety of the small sums, which might be expended, the reputation of the Commanding Officer is pledged to the public."

An explanation is due for Mr. Ross of Pennsylvania, who, in consequence of the certificate of President Adams, obtained a credit for five hundred dollars. It is within my knowledge that the expense was incurred in 1796, that the object was authorized by President Washington, and that it related to supposed designs of a foreign nation.

The Committee seem to suppose that the act of February 9th, 1793 (1 Stat. L., 299), first authorized secret expenditures, in relation to the Department of State. In my opinion they have neither traced the subject to its source, nor comprehended the object of the regulation which they have cited; the act, which made the first provision for the expenses of foreign intercourse, was passed on the first of July 1790; this act first gave activity to the operations of the Department of State, under Mr. Jefferson; it authorized the President to draw from the Treasury, Forty Thousand Dollars annually, for the support of such persons, as he might commission to serve the U-(43) nited States in foreign parts, and for the expense, incident to the business, in which they might be employed; except in respect to the salaries of Ministers and Secretaries, which were limited, the expenditure of the fund, was absolutely committed to the discretion of the President; this discretion could not however be more unlimited, than that which was vested in respect to the Fund for the contingent expenses of the Department of War; the proviso of the Law of July 1st, 1790, only directed that the President should account specifically for all such expenses, as in his judgment might be made public, and also for the amount of such expenditures as he might think it advisable not to specify: it is certain that this proviso, did not extend the discretionary power previously given, and is to be understood merely as a direction respecting the mode of rendering accounts.

The Act of February 9th, 1793, cited by the Committee, expressly revives the Act of July 1st 1790 (1 Stat. L., 128), then about to expire: this circumstance is not stated by the Committee: it is however important, because the discretionary power of the President, was thereby continued in full force: while the second Section, which the Committee have pleased to consider as a special authority to expend money for secret services, merely provides for the settlement of accounts, according to principles, pre-supposed to be well understood, or defined.

The Act of May 10th, 1800 (2 Stat. L., 78), the last cited by the Committee, is, if possible, more irrelevant to the subject than the former; it merely considers expenditures for secret services in the Department of State, as a description of contingent expenses; they must truly be so viewed: they have been so considered by the Department of War; no person ever imagined that such expenses were an ordinary charge of the government requiring an established provision.

The result of this examination, therefore, proves, that certain sums have been appropriated for the Contingent Expenses of the Departments of State, War and the Navy: that no specific objects have been defined in the laws, to which these funds should be applied: that the application, in respect to all the Departments, has been

equally discretionary; and therefore that all the expenditures have been equally lawful, or unlawful: that a few inconsiderable expenses have been incurred in the War Department, the objects of which could not, with propriety, be communicated to the public: and that, in the mode of adjusting the amount of these expenses, a rule has been pursued, which the Legislature had previously established, in respect to the Department of State.

The Committee wish to have it believed, that a special authority has been given to the Department of State, to expend money for secret service, and to infer, from the defect of a similar authority in the other Departments, that the expenditures have been illegal. As the facts, relating to the subject, were not fully and correctly stated, the inferences have been demonstrated to be unsound: if, how- (44) ever, the erroneous premises of the Committee must be assumed, it is proper to note, to what conclusions a spirit of charity would lead. It might be observed, that it is the duty of the Secretary of State, to conduct negotiations, in time of war, for the purpose of obtaining peace; and in time of peace, by friendly and sincere representations to the agents of foreign nations, to preserve the peace; and that no duty has been assigned to this officer, which has not a pacific tendency or relation. If the refinements of casuistry must be substituted for the maxims, which ordinarily govern men of business; if the possession of a secret necessarily implies the concealment of some immorality; and if the funds for secret services are always employed for purposes of corruption, (positions which I do not admit), still it might be urged, with a semblance of argument, at least equal to that of the Committee, that the Laws of War authorize the employment of Spies, and, in many instances, the seduction of enemies; but that all artifice, bribery and corruption, in the Civil Intercourse of nations, is declared to be unjustifiable: from hence it might be concluded, that, while no doubt could exist, of the right of a Secretary of War, or a Secretary of the Navy, to employ money as an engine of hostility, a Legislative dispensation was requisite, to satisfy the philosophic scruples of a Secretary of State.

The suggestion of the Committee, that the practice of the former Administration is not reconcilable with the principles of a representative government, is as incorrect as their other observations. If they had proved, that the Government had united all the citizens in one bond of affection and confidence; that it had purified all exotic and spurious elements; that it had so elevated the virtue, and confirmed the patriotism, of the people, that the funds of foreign nations could here find no employment; then indeed there would be cause for congratulation, that these principles had received a desired illustration: but to be silent on these topics, and to deny to our Government the means of repelling the force, or combating the intrigues, of foreign nations, is virtually to declare, that our own

magistrates, chosen by ourselves, have no integrity, and that unlimited confidence may be placed in the justice and virtue of foreign rulers.

Powell, CONTROL OF FEDERAL EXPENDITURES, (The Brookings Institution, 1939) pp. 325-333.

Extracts from

TRAILS, RAILS AND WAR
The Life of General G. M. Dodge
by J. R. Perkins
(Bobbs-Merrill - 1929)

* * * * * * * * * * * * * * * * * * *

General Forrest finally became suspicious of Henson, arrested him and sent him to General S. D. Lee at Tuscaloosa, and recommended that he be shot. Henson made out a good case to Lee, who sent him to Meridan for trial. He was tried on the charge of being a spy in the employ of the Federals and for "buying cotton for the Yankees and investing $200,000 in Confederate money in lands for General Dodge."

The truth was, Henson had handled large amounts of Confederate money that Dodge gave him to defray his expenses traveling through the South. At times he carried as high as ten thousand dollars in Confederate or state bank money and scattered it lavishly to gain his point.

The land and cotton speculation charges against Henson soon circulated through the Federal army in the South and General Dodge came under fire. He had sold cotton to help finance his hundred secret service men, but he was challenged to prove that he expended the money as he declared. It was something of a dilemma, for Dodge refused to reveal the names of the secret service men to whom he had given the money for fear the information would reach the communities in which they lived. They were loyal Union men living in southern towns, and secrecy was imperative. Finally, Dodge was accused of speculating in cotton for personal gain and matter was carried to Grant.

Grant told Dodge that he would have to grin and bear it, and Dodge did. But grinning and bearing it resulted in the belief that he enriched himself in cotton speculation during the war which, in view of the fact that his family was in near-want, was something that he did bear but over which he could not do much grinning.

p. 113

In full explanation of how his secret service men were financed, Dodge said:

> "It took large sums of U. S. money, a large amount of Confederate money and money of the local banks in Southern states

to pay the expenses of scouts and spies. In travelling through the South they used Confederate money. The greenbacks they had for emergencies. A spy, in starting on a long trip, was given from five to ten thousand dollars in Confederate or state bank money. As we occupied the enemy's country we gathered up large amounts of this money, and my correspondence with General Grant will show how we obtained other funds and how they were expended."

The correspondence to which Dodge refers began in the opening days of 1863 and continued until spring. The first letter is dated January third and was written from Corinth. It said:

"I have the honor to report that the cotton mentioned in the enclosed communication was seized and sold by my orders at public sale. The funds taken and accounted for are being used for secret service. The quarter-master department being unable to furnish me funds, and it being necessary to have them for this work, the cotton was sold publicly, the money disbursed under my direct supervision, and the vouchers retained by me to be forwarded at the proper time."

But there was some disagreement between the Federal officers at Corinth over the sale of this cotton and the use of the money to employ men for the secret service, and Dodge wrote Grant a second letter a month later:

"I respectfully request that the funds raised here from the sale of cotton be turned over to me and used as a secret service fund. It is impossible to obtain competent men for such service unless they are well paid in cash. I have assembled a group of highly efficient men for the secret service and unless I can have funds to use I can not hold them together. The sale of cotton up to this time amounts to about $20,000."

Grant replied that pay vouchers, certifying that the money had been expended by Dodge in payment of men in secret service, would be all that would be required. "But," Grant added, "when prudent to obtain receipts, do so to protect yourself." Dodge's difficulty, sensed by Grant, was to secure receipts from the secret service men he paid. Many of them lived in the South and refused to sign vouchers or to give receipts for fear of being known as Federal spies, for it was inevitable that some of the vouchers and receipts fall into the hands of certain Federal officials at Corinth and at Memphis and the names of the secret service men be bandied about. The situation was both delicate and difficult and threatened to break up the organization.

Three years after the close of the war the auditors of the War Department discovered that Dodge had spent money during the war for spies for the armies of Grant and Sherman, and peremptorily ordered him to make an accounting of the exact sum. General Dodge referred the auditors to the report of Grant's provost marshal at Corinth, and the War Department replied nineteen years later to this effect:

> "Your secret service accounts for the years 1863 to 1865, amounting to $17,099.95 have been examined and adjusted, and are now closed on the books of this office."

pp. 118-120

Extracts from

Regulations for
Intelligence Duties in the Field

War Office 1904

The D.M.I. has, under the G.O.C.-in-Chief, control over all intelligence and secret service funds. All funds drawn by intelligence officers from the Army Pay Department for intelligence purposes are debited to the D.M.I., and must be accounted for to him.

Should a portion of the army be permanently detached or should it be operating more or less independently, the G.O.C.-in-Chief may appoint an officer of the General Staff of the G.O.C. the detached Forces to the charge of the intelligence accounts of the force, in which case the instructions which follow will apply to him exactly as if he were D.M.I. of the Force.

The accounts branch of the D.M.I's office should, whenever possible, be located at headquarters, and in any case should be within easy communications. Should it be necessary to establish the accounts office at the base, or at some spot where communications with headquarters is difficult or liable to interruption, one at least of the officers or accountants of the branch should accompany the D.M.I.

The D.M.I. will keep all sub-accountants informed of the location of the accounts office, and should the office be situated elsewhere than at headquarters, will instruct them whether the channel for communication of accounts business shall be direct with the accounts office, or through the D.M.I.

There are two classes of sub-accountants:

(1) Direct sub-accountants who deal direct with the D.M.I. This class will usually be confined to intelligence officers on the staffs of G.O.C. Army Corps, occupied districts, or lines of communication, and possibly cavalry divisions or other rapidly moving forces. For convenience these will hereafter be denoted as "A."

(2) Indirect sub-accountants. These are sub-accountants of "A" and will usually be intelligence officers on the staff of commanders of divisions, brigades, portions of occupied districts, or sections of lines of communication. These will be denoted as "a."

A direct sub-accountant "A" is empowered to draw funds direct from the Army Pay Department, or from any source over which the general under whom he is serving has control. He may extend this power to his indirect sub-accountants "a," "a," "a."

When funds from the Army Pay Department or from local sources are not available, any intelligence officer having funds may transfer to any other intelligence officer authorized to draw money, such funds as he can spare.

All money drawn by "A" or by his sub-accountants "a," "a," "a," is debited by the D.M.I. to "A." Similarly, all money expended by "a," "a," "a," is credited to "A." "A" is therefore responsible to account for the expenditure of his sub-accountants.

Every financial transaction between an intelligence sub-accountant and the Army Pay Department, or another intelligence sub-accountant or any other public or private individual, department, or concern, is to be reported at once to the D.M.I. by both parties, and if the sub-accountant or sub-accountants are not direct sub-accountants, the information is to be repeated to the direct sub-accountant or sub-accountants to whom he or they are directly responsible.

Thus, if "a" draws money from the Army Pay Department, "a" and the A.P.D. officer both report the transaction to D.M.I., and to the "A" to whom "a" is responsible.

If "a" draws money from "al" reports are sent by both to--

1. The D.M.I.
2. The "A" to whom "a" is responsible.
3. The "A" to whom "al" is responsible.

Such reports will show merely the date and amount of the transaction and the rank, name and official designation of the parties.

It is the duty of the officer drawing the money to inform the other party to the transaction of the necessity for these reports.

It may occasionally be necessary or advisable for one intelligence officer to request another to pay employees who may be traveling, or to pay local accounts or in other ways to disburse money on his behalf. In such cases the officer performing the service should take credit for the amount expended, transmitting a statement and the vouchers to the officer to whom he is responsible whether his "A" or the D.M.I., and informing the officer on whose behalf the money has been expended of the details of the transaction.

In his own accounts the officer performing the service will show the amount expended as a lump sum disbursed on behalf of

"Captain X., General Staff, 2nd Cavalry Division, as per vouchers forwarded on date." He should keep a detailed record of the transaction in case of the loss of vouchers.

Every financial transaction between an intelligence officer and any other party must be completed and recorded. Loans are not permitted.

Expenditure of the funds entrusted to the D.M.I. is classified as follows:

1. Intelligence expenditure.

   (a) Pay.

   (b) Rewards and special payments.

2. Secret service expenditures.

The system of accounting for intelligence expenditure provides that every sub-accountant is finally responsible for his accounts to the D.M.I.

In order to keep control of expenditure, and to facilitate the rendering and correction of accounts, each direct sub-accountant "A" is responsible for the first examination of the accounts of his subordinate sub-accountants "a", "a".

It is also the duty of every direct sub-accountant "A" to give every assistance to his subordinates in the matter of their accounts, and similarly, the accounts office of the D.M.I. is available to give assistance to sub-accountants who may find difficulties in the preparation or adjustment of their accounts.

Special F.I. forms are provided for the two sections of intelligence expenditure. Specimens of these forms (A.F. N. 1465 and N. 1467) are attached.

These forms are, in the first place, filled in monthly by the sub-accountants who actually expend the money. These sub-accountants may possibly find it necessary, when their employees are scattered, to entrust to subordinates the duty of conveying the actual cash or cheques, and of obtaining receipts, but in no case are the accounts forms to be filled in by any person subordinate to the sub-accountant, unless under his personal supervision.

In cases where, owing to the exigencies of active service, the sub-accountant finds it impossible to furnish his accounts on the proper forms, a correct statement of his expenditure in any form,

with the required vouchers, will be accepted. In such case the proper forms will be made out by his "A" or, if necessary, by the D.M.I., and forwarded to the accounting officer for acceptance and signature.

Having completed and signed the forms, the sub-accountant "a" forwards them, with the necessary vouchers, to the officer to whom he is financially responsible, "A." The forms for pay and special payments are accompanied by a summary (A.F. N. 1466), and the whole enclosed in A.F. N. 1464 (Receipts and Expenditure).

Sub-accountants should invariably keep duplicates or records of their accounts to protect themselves in case of loss of the originals, and to obviate the necessity of returning the originals in case of errors or discrepancies being discovered in audit.

The direct sub-accountant "A" having collected the accounts of his subordinate sub-accountants, and added his own, will inspect the accounts to assure himself that the vouchers correspond with the expenditures, and that there is no material error in calculation. Should any discrepancy or error exist, he will either return the accounts corrected, or fresh accounts, for acceptance and signature, or will notify his subordinate sub-accountant of the objections instructing him to reply direct to the D.M.I., in which latter case he will forward the whole of the papers, except the A.F.'S N. 1464 of his subordinates, which he retains and replaces by his own A.F. N. 1464, to the D.M.I. He will at the same time send to the D.M.I. a copy of his observations to his subordinates on their accounts, and any remarks he may think necessary.

It is undesirable that a direct sub-accountant should delay the whole of the accounts for which he is responsible by retaining for correction the statements of a subordinate unless the subordinate be within easy reach, or unless the case be one which, in his opinion, demands his immediate interference.

On receipt of accounts, the D.M.I. will at once audit them, and will as soon as possible inform each sub-accountant of the result, repeating the information to the direct sub-accountants for the group of accounts forwarded by each. When accounts are found correct, a notification that the balance is accepted is sufficient. Where errors exist or certificates are wanting, the sub-accountant will be notified, and if he accepts the balance as shown by the D.M.I., or when a balance is agreed on between him and the D.M.I., a fresh statement and the necessary certificates will be made out in the D.M.I.'s office and forwarded to the sub-accountant for signature and return.

When the accounts for a month are audited and completed they will be passed by the D.M.I. to the Army Pay Department as vouchers for his expenditure.

Bills, expenses, etc., properly chargeable to other departments, but unavoidably incurred out of intelligence funds, should be kept apart from ordinary expenditure and collected monthly into one statement, to accompany the others in A.F. N. 1464. Every payment should be briefly explained and fully and separately marked or certified.

Receipts should be taken for all payments. Receipt signatures should not be borne on the statement itself, but should be either on a separate sheet or on single forms (specimens attached). The object of this separation is to avoid holding back entire accounts for the sake of absent signatures. Every effort is to be made to obtain receipt signatures, but if they are unobtainable, then the sub-accountant's certificate in lieu of receipt should be forwarded before sending in the accounts of the month subsequent to that in which the receipt was wanting.

Both statement and voucher (receipt or certificate) should show clearly the rate of pay, and the dates, period and nature of employment covered by each payment.

Advances to employees on account of pay are not permitted. Every item on a pay list should represent so many days' pay reckoned from the date up to which pay was last issued.

In the event of an employee being sent on a mission necessitating an advance of money on account of pay, the advance should be shown as a special payment, a receipt taken, and the employee's name shown separately on the pay roll as not in receipt of pay until he has returned and the advance has been readjusted.

The practice of allowing arrears of pay to accumulate is one of the chief causes of confusion in accounts. Unless there are local reasons against the periodical distribution of cash to intelligence employees, every sub-accountant should do his best to bring his payments up to date, so that his statements may be as far as possible complete for the months to which they refer. It is not, as a rule, advisable that an officer should act as banker for employees within reach of their pay. Should it be necessary, for local reasons, to allow pay to accumulate, general instructions on the subject will be issued by the D.M.I.

Should an employee be stationed at or sent to a place to which it is advisable to send his pay, a report to this effect should accompany the accounts.

In the statement of expenditure for any one month, there should be no overlapping of payments for services rendered during another month. Credit entries held over, through accident or necessity, and not included in the accounts of the month to which they belong, should be put on supplementary statements for that month and should follow the original statements at the earliest possible date.

Credit for such amounts may be taken in the current month's A.F. N. 1464.

Fines and stoppages should be treated as money refunded and shown as debits, credit being taken for full pay.

Every intelligence sub-accountant, on relinquishing his appointment, should balance his account and forward a statement through the proper channel. Any balance remaining on hand should be transmitted with the account or handed over to the relieving officer, his receipt being transmitted. Failing this, a balance may be transferred to any other intelligence sub-accountant, or handed into an officer of the Army Pay Department, a receipt being taken and forwarded in each case. Whatever mode be adopted the D.M.I. should be informed direct by both parties.

Secret service expenditure will invariably be accounted for direct to the D.M.I.

Those officers who are to be authorized to expend intelligence money on secret service without previous reference, will receive their authority from the D.M.I., and all intelligence officers will be notified that such authority has been issued. In dealing with large amounts, it is desirable that the concurrence of the General Officer Commanding-in-Chief, through the D.M.I., should be obtained.

Other intelligence officers may obtain authority to expend intelligence funds on secret service from the D.M.I., or from one of the officers authorized as above, reference being made for each general item of expenditure.

In cases of emergency, any officer having intelligence funds at his disposal may expend such funds on secret service, on the written demand, or with the written concurrence of the general or other officer on whose staff he is serving. Each separate service must be specified.

Officers must use great discretion in the preparation and forwarding of reports on secret service expenditure. It is desirable that such reports should be in the form of accounts, and that, in cases where payments are made to persons who cannot be compromised, receipts should be obtained. But the risk of imperilling the safety

or reputation of an agent or employee by recording anything by which his service might be traced must be carefully avoided. It may even be necessary to limit the report to the simple certificate that such sums have been properly expended on secret service, leaving all detail for personal communications or a verbal message.

For example, expenditure on the purchase of supplies, stores, or a horse for a secret service agent should be vouched, while the payment of a large sum to a soldier of the enemy should be unrecorded.

In case of an officer incurring a large secret service expenditure on which any account would be indiscreet, he should inform another officer engaged on intelligence duties, or if there is none available, the general officer on whose staff he is serving, of the details of the expenditure, and inform the D.M.I. of this action.

Reports on secret service expenditure will be sent monthly to the D.M.I. by those officers authorized to expend money without previous reference, and by other officers at the end of the months in which expenditure has been incurred.

Extracts from

INTELLIGENCE
by S. Theodore Felstead
(Hutchinson & Co., London - 1941)

Apart from all this, however, the British Treasury has never looked with a very kindly eye on the spending of huge sums for the secret services. Intelligence was the Cinderella of the forces, and a source of tolerant amusement to the Generals and Admirals. It was much the same with the Foreign Office; the Political Intelligence Department was just a fractious child that had to be kept quiet with a little money.

p. 14

In their unending espionage activities in foreign countries, the secret agents of Germany have one guiding rule--money talks. Now and again they find a fool who believes that they will assist him to political power if he falls in with their schemes, as witness the case of the Alsatian agitator, Dr. Roos, and, if it comes to that, some of the weak-minded fools in this country who are now in internment.

But money is what really matters, and money was what they were prepared to spend to achieve their ambitions. The American investigator, Colonel W. J. Donovan, who came to Europe last summer to look into the Fifth Column side of the World War, put the Nazi expenditure in this direction at 50,000,000 pounds.

Such a sum may well have been spent; nobody will ever know, unless von Nicolai, Goebbels, or Ribbentrop choose to open their mouths --which is most unlikely. There were no vast sums thrown away in England; they paid the estimable Scottish Professor Laurie, on his own confession, 150 pounds for writing a book called The Case for Germany, which was dedicated to Hitler with these soul-stirring words:

> "The Peoples of Europe, of Great Britain, and the British Empire have the choice of adopting the Policy of Hitler and Peace, or of Chamberlain, who is being driven by forces hostile to Germany to war.
>
> "I thank God that the peace of Europe is in the guardianship of the Fuehrer, and therefore, in spite of the frantic efforts of all those here, and in Europe, and in America who want war, secure."

It is to be wondered what this pragmatic Professor thinks of Hitler's policy now! Considering his innumerable scientific attainments, the Nazis got pretty good value for their 150 pounds. However, he was probably no worse than some English newspaper proprietors who were accepting German tourist advertisements for the "beautiful, peaceful Rhineland," three weeks before the outbreak of war. They were not ordinary advertisements either; they were big, three-column "splashes" for which special rates would be demanded.

Where did that money come from? The Rhineland hotel proprietors? We think not.

Professor Laurie's denunciation of poor Mr. Chamberlain as a warmonger is too humorous for words. If anybody in this world ever staked a claim to the Nobel Peace Prize, Mr. Chamberlain was surely the man.

There has never been the slightest evidence that the British Union of Fascists, led by the aristocratically bred "Tom" Mosley, ever received money from German sources. If there had, Sir Oswald would have had to answer for it. Nor have any other of the pro-German cranks who floated around London promoting leagues for the betterment of Anglo-German relations been involved seriously enough to justify a prosecution. The making of political martyrs is a dangerous game, as we found to our cost with Sir Roger Casement.

Admittedly the Nazis have thrown away many millions on propaganda, bribery and corruption and espionage. Subsidising newspapers all over the Continent must have run away with the better part of 5,000,000 pounds, for there is no advertising revenue from such publications. All the "ads." are spoof, German in origin and unpaid for. But such papers were cheaply run by the third-rate journalists employed.

News services to all parts of the world cost, and are still costing, several thousand pounds a week, not counting the bribery indulged in to get the dope printed. As much as 100,000 pounds a week may be going in this direction.

It is when we come to the real bribery and corruption, the graft of "Senator's size" as O. Henry used to describe it, that we approach the really big money "invested" by the Nazis. A top-grade venal statesman--south-eastern Europe abounds with them--would probably ask, and receive, 250,000 pounds to emulate the role of the dog in "His Master's Voice." In Roumania it would be worth while, as it must have been in Poland and Czecho-Slovakia.

Traitors in other quarters, say in Sweden, Norway, Denmark, Holland, Belgium, France, and Switzerland, would all want a rake-off.

When Paul Reynaud, the French Premier, arrested the infamous Amourelle --and foolishly omitted to have him guillotined on the spot--it was with evidence that the Nazis had bribed the gentleman to the handsome tune of 2,000,000 pounds to betray the innermost secrets of the French Army. Amourelle was a sort of rapporteur of the Chamber of Deputies, the man who attended secret sessions to take the records. The go-between in this disastrous affair was one Countess von Einem, the wife of a German General. She and Dr. Otto Abetz, now the Nazi Ambassador to the Petain Government, did pretty much as they liked in Paris for quite a long time. The writing on the wall!

Still, there were dozens more in the capital doing the same thing. In Amourelle's case 2,000,000 pounds was probably gross exaggeration.

In the United States and South America there would also be a vast sum involved--possibly a matter of 5,000,000 pounds. The U.S. Government unearthed a total sum of 1,250,000 pounds to the chief German propagandist's bank accounts before deporting him, and in all likelihood there is another couple of millions floating around for spying, sabotage, and sedition.

Down in Turkey, our old friend Franz von Papen, an expert in the art of "straightening," must have a nice little bank account to play with, if with little success up to the present.

In Budapest, Belgrade, Sofia, and Athens, there are other hordes on the pay-roll, ditto in Madrid and Lisbon. There are spies and counterspies, journalists, and cinema men, all part of the vast machine which seeks to win wars by the back door. Their success has not been inconsiderable. To have compelled the Roumanian Government to expel the employees of the British and French-owned oil wells in their country was an outstanding example of what bribery and intimidation can accomplish.

Approximately one can put all this clever subornation to another 20,000,000 pounds. How much von Nicolai has spent on his multifarious espionage services is an unshroudable mystery. The rates paid for the English agents were not high; they were on results and those were not at all brilliant.

Colonel Donovan, then, may not have been so far out in his estimate of 50,000,000 pounds. But an equally stupendous sum must have gone in wages for the hundreds of thousands of Nazis who were sent into Holland, Belgium, Denmark, and Norway for Fifth Column work. Most of these people were established in bogus businesses of some kind; in other cases, where land adjacent to German frontiers was deemed advisable, farms and houses were bought. But in the frugal eyes of the German it was not money wasted; the properties would always be realisable later.

However, if the time should ever arrive when the Board of Directors of the Berlin Society for the Improvement of Mankind thinks fit to issue a balance sheet, this 100,000,000 pounds will certainly appear as legitimate investment. It will go in as advertising expenses and overhead charges.

The operations of these political gangsters seem to bear a striking resemblance to those of the fraudulent company promoters and bucket-shop proprietors who flourish in England so freely. The Nazis acquire, by devious and dubious means, all the smaller nations on the Continent, in very similar fashion to the financiers who "amalgamate" numbers of businesses into one big holding company of which they can rig the shares to their own satisfaction. The latter, of course, usually pay the owners with ordinary or preferred shares, keeping the "deferred" to themselves. They will then issue their bogus balance sheets until the "ordinary" and "prefs" are worth nothing, buy them in, until one fine day everything is theirs for next to nothing.

There may come a day, of course, when all this get-rich-quick finance may begin to smell in the nostrils of the German public. This is the signal for the directors to begin salting away in foreign countries large slabs of negotiable currency and securities, usually in the name of a wife--just precisely as Herren Ribbentrop, Goering, Goebbels & Co. have been doing. If half of what the redoubtable American journalist, Mr. H. R. Knickerbocker, had to reveal about the directors of the Nazi Holding Company planting big sums of money outside the Fatherland was true, then they are under no delusions as to their future fate. The time will come, in their opinion, when they will have to emulate Jabez Balfour, Whitaker Wright, Gerard Lee Bevan, and others of the absconding fraternity.

Pp. 106-109.

Easily the best investment we could have made immediately war had broken out was the spending of anything up to 10,000,000 pounds on first-class "Intelligence." Never would money have been better laid out.

P. 112.

THE FACADE OF MILITARY SECRECY

When an individual senator tries to probe into the details of the budget and to get information about it, he runs up against further difficulties. One of these is the tendency of the military to classify material and to make it unavailable or at least difficult to obtain. Such material, as is well known, is classified in ascending order of importance--"restricted," "confidential," "secret," and in some cases "top secret." Somebody once said that there is still another classification--"burn before reading."

No one wishes to obtain truly classified information. A man is always afraid that he may talk in his sleep or that he may let something slip out in conversation with others. A congressman who is worthy of his salt wishes to preserve to the fullest degree the necessary confidences of the government.

But there is a tendency for the Defense Department, and for the defense services, to overclassify a great deal of material. Sometimes this is done through a natural desire to make safe decisions. Sometimes, however, it is done to obscure mistakes made by the Defense Department and to make some of its activities more inaccessible. Doctors can bury their mistakes. The military can achieve the same end by "classifying" theirs.

My colleague, Senator Thomas Hennings of Missouri, who was a distinguished naval officer during the last war, made the following statement in the debate on the military appropriations bill:

> "Certain high-ranking officers of the armed services to my knowledge in the past have made it a practice to have certain nondescript and routine papers stamped 'secret' for their own private purposes."

I will not say that there is an Iron Curtain around the Pentagon. But there are a series of silken curtains which obscure one's view of the defense establishment.

Douglas, ECONOMY IN THE NATIONAL GOVERNMENT (University of Chicago Press, 1952), pp. 143, 144.

THE CLASSIFIED BUTLERS

In discussing the difficulties of scrutinizing the military budget, I mentioned the silken curtains of security which sometimes surround the Pentagon. These maintenance allotments furnish an excellent example of how security may be abused. They are charged to a fund entitled "Contingencies of the Army," which, for very valid reasons, is handled at the complete discretion of the Secretary of the Army and for which he is comparatively unaccountable. Yet funds such as this, which totaled $170 million for the three services in 1951-52, can be used for wholly nonsecret purposes, and the maintenance allotments are a prime example. I have no wish to jeopardize the nation's secrets. But I think it important that the military should not be permitted to place such nonsecret items as expenses for rent and servants behind a facade of needless secrecy.

To be quite specific, I tried to obtain the simple administrative instructions which describe the purposes for which maintenance allotments may be spent. Although these instructions bore the lowest possible classification of "restricted," the Army was extremely loath to part with them. I then tried to discover how much of the public's money was spent paying for the rent and servants' staffs of our military attaches. I found that this information, dealing with exactly the same subject matter, was classified one step higher--"confidential." I was not able to pry this secret from the Army.

Douglas, ECONOMY IN THE NATIONAL GOVERNMENT (University of Chicago Press, 1952), pp. 184.

NOTICE

6 August 1952

25X1A [redacted]

SUBJECT: Proper Use of Unvouchered Funds

1. This Agency was granted unvouchered funds authority solely to meet those conditions which are created by the peculiar nature of CIA's functions and activities. It was not granted to be used to relieve ourselves of administrative problems which are common to Government generally and are not affected by factors unique to CIA.

2. Requests for exercise of special unvouchered funds authorities for solution of ordinary administrative problems are in many cases reflections of poor planning or administrative failures which could be avoided. In the preponderance of such cases an employee is requesting reimbursement for personal, out-of-pocket expenses arising from circumstances beyond his control and in which his personal interest is not involved. Frequently the cases involve last-minute determinations to change the travel or assignments of individuals. Such last-minute changes are, in many instances, the result of poor planning and cannot be supported on true operational grounds. Other cases have resulted from either misinterpretation of regulations by individuals in a position to know better or advice by individuals not in a position to render advice or to commit the Agency.

3. Any such cases arising out of poor planning or unjustified determination, which therefore cannot be supported by operational necessity, or any claim arising out of administrative error or misinterpretation or unauthorized commitments must be considered a serious reflection on the competence of the employee making the error.

4. The Comptroller and the General Counsel should always be consulted prior to a commitment if there is any question whatever concerning a contemplated expenditure.

FOR THE DIRECTOR OF CENTRAL INTELLIGENCE:

/s/ L. K. WHITE
Acting Deputy Director
(Administration)

1. CONCEPT

The basic function of the Finance Office is to render effective, timely, and secure financial support for agency operations and activities. Our concept of the nature and scope of this task is outlined below:

a. Budgeting

Prepare the agency budget in such form as to focus attention on the general character and relative importance of activities and operations in terms of funds requirements, and administer the budget through a system of allotments and reports to assure that funds are apportioned and used in support of approved operational programs and objectives. We conceive the agency budget as being an instrument of management consisting of the processes by which work programs and operational objectives are translated into financial terms, analyzed, evaluated and determinations made and reflected in the form of budget estimates; the necessary funds justified and obtained from the granting authority and alloted or distributed to the proper units; adequate measures maintained for accountability and expenditure control and for assuring at all times that the funds utilized for the execution of authorized programs of work are being expended in the most effective and economical manner possible, and that the results are analyzed, measured, evaluated, and reported upon in an effective manner.

b. Disbursing and Monetary Activities

Procure, maintain custody of, and disburse official funds required to support agency activities in such manner as to insure the security of the operation, the financial integrity of individuals, and prevent the physical loss, destruction, or theft of funds. Security requires the development and application of special methods and techniques in connection with most of our monetary and exchange activities. This involves special financial agreements and continuous liaison with the General Accounting Office, the U. S. Treasury, the Military Establishments, the ECA, the State Department, and a number of other government agencies. In addition to utilizing the financial cover and support of other government agencies it is necessary to set up financial facilities outside the government in support of covert activities in order to gain greater security, furnish support which cannot be provided within the government, and to assure that the U. S. Government may not be compromised by such

[redacted]

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[redacted]

c. Accounting

Develop sound accounting practices and procedures which fix responsibility for the reporting and accounting for expenditures to the degree compatible with security and operational circumstances, and maintain such accounts and records as may be required to provide a basis for comprehensive financial reports to the Director and operating officials. The traditional accounting concepts of government and business is based upon various systems of checks and balances, and such systems are dependent upon basic factual documents, usually of a formal or standardized type. In this agency however, the security and operational circumstances attending the expenditure of funds for intelligence operations demands that balanced recognition be given to the need for a flexible basis of accounting in the light of varying types of operations and security conditions. It is therefore important that the agency accounting procedures consist of "Rules of Reason" instead of "Rules of Thumb" and that stress be placed upon principals and criteria instead of inflexible regulations. Our general concept of the requirements for basic accounting is to get properly itemized vouchers or receipts wherever, and to the extent that, security and operating conditions permit, and in the instances where security does not permit to require a positive statement from the individual expending the funds that they were expended for a proper official purpose in connection with a specific project or activity. The need for flexibility in accounting procedures is apparent when viewed in the light of the fact that more than 150 installations and major projects, and more than 1300 smaller projects and individuals have custody and physical possession of official funds which they are authorized to expend for official purposes.

d. Audit and Inspection

Conduct such examinations and audits of vouchers, accounts, and records, and such site audits and inspections of financial activities at installations or field locations as may be necessary to assure the administrative competence and fidelity of

individuals in connection with the expenditure of funds for proper official purposes in accordance with established agency policies. The complexity and geographical dispersion of our financial transactions, and the degree of flexibility and tolerance which must be observed, for security reasons, in connection with our accounting requirements, presents opportunities for indolent and unethical financial practices to flourish behind a screen of "security". Our observation of the financial case history of covert operations in this and the predecessor agency leads us to believe that abusive or unethical financial practices will not be followed by the majority of our employees even where there is no restraining influence in the form of an audit and inspection program. However, it appears that the instances of abuse do increase where there is a lack of adequate financial audit and inspection. It also appears that there is a direct relationship between financial objectivity and integrity and operation objectivity and security, and that financial abuses tend to pervert or distort operational objectivity and results in unproductive and abortive operations. Another aspect which must be considered is that the funds we use are public funds and it is a fundamental concept in the United States that there must be an accounting for the "people's" money. The Congress has, in the interest of national security, authorized the agency to account for funds by a certificate from the Director to the effect that the funds have been properly spent for the public benefit. It appears obvious that any repeated instances of flagrant abuse or laxity in connection with this discretionary responsibility would serve to undermine the confidence of the Congress and the public, in the agency, which in all likelihood would result in a decrease or curtailment in the use of public funds. Our concept of the Audit and Inspection function is that it should be the instrument used to deter, check, or prevent such abusive practices and insure that a high standard of individual integrity and official objectivity is observed in the use of official funds.

Approved For Release 2000/08/04 : CIA-RDP78-05246A000100010001-3

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U. S. GOVERNMENT PRINTING OFFICE 16—68548-2